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EDITOR'S NOTE

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No. 86-947-CSX
Status: GRANTED

Title: Employment Division, Department of Human Resources of the State of Oregon, et al., Petitioners
v.
Galen W. Black

Docketed:
December 2, 1986

Court: Supreme Court of Oregon

Vide:
86-946

Counsel for petitioner: Linder,Virginia L.

Entry	Date	Note	Proceedings and Orders
1	Dec 2 1986	G	Petition for writ of certiorari filed.
2	Jan 5 1987		Brief of respondent Galen W. Black in opposition filed.
3	Jan 7 1987		DISTRIBUTED. January 23, 1987
4	Mar 2 1987		REDISTRIBUTED. March 6, 1987
5	Mar 9 1987		Petition GRANTED. The case is consolidated with 86-946, and a total of one hour is allotted for oral argument.
			**
6	Apr 3 1987		DEFERRED APPENDIX METHOD.
8	Apr 3 1987		Order extending time to file brief of petitioner on the merits until May 22, 1987.
10	May 21 1987		Order extending time to file brief of petitioner on the merits until May 29, 1987.
11	May 21 1987		Record filed.
12	May 29 1987		Brief of petitioner Employ. Div., etc. filed. VIDED.
14	Jun 16 1987		Order extending time to file brief of respondent on the merits until July 29, 1987.
19	Jul 28 1987		Brief amici curiae of ACLU, et al. filed. VIDED.
15	Jul 29 1987	D	Motion of American Civil Liberties Union Foundation, et al. for leave to participate in oral argument as amici curiae and for divided argument filed.
17	Jul 29 1987		Brief amici curiae of Native American Church of NA, et al. filed. VIDED.
18	Jul 29 1987		Brief amicus curiae of American Jewish Congress filed. VIDED.
20	Jul 29 1987		Brief of respondent Alfred Smith and Galen Black filed. VIDED.
16	Aug 6 1987		CIRCULATED.
21	Aug 14 1987	X	Joint appendix filed. VIDED.
22	Sep 21 1987		Motion of American Civil Liberties Union Foundation, et al. for leave to participate in oral argument as amici curiae and for divided argument DENIED.
23	Oct 9 1987		SET FOR ARGUMENT. Tuesday, December 8, 1987. This case is consolidated with No. 86-946. (2nd case) (1 hr)
24	Dec 1 1987	X	Reply brief of petitioners Employ. Div., etc., et al. filed. VIDED.
25	Dec 3 1987		Orders from Oregon Court of Appeals in relevant cases received and distributed. VIDED.
26	Dec 8 1987		ARGUED.

PETITION FOR WRIT OF CERTIORARI

(1)

86-947

No. ______

Supreme Court, U.S.
FILED
DEC 2 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

EMPLOYMENT DIVISION,
DEPARTMENT OF HUMAN RESOURCES
of the STATE OF OREGON,
RAY THORNE, Administrator
and ADAPT
Petitioners,

v.

GALEN W. BLACK
Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of Oregon

---

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QUESTION PRESENTED

Does the Free Exercise Clause compel a state to award unemployment benefits to a drug rehabilitation counselor who agrees to refrain from using illegal drugs as a condition of his employment and is fired for misconduct after illegally ingesting peyote as part of a religious ceremony?

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PETITION FOR WRIT OF CERTIORARI

Petitioners, the Employment Division, Department of Human Resources of the State of Oregon, and Ray Thorne, Administrator, (hereinafter "the state") respectfully pray that this Court issue a writ of certiorari to review the judgment and opinion of the Oregon Supreme Court in *Black v. Employment Div.*, 301 Or. 221, 721 P.2d 451 *reconsideration denied* (1986).

OPINIONS BELOW

The opinion of the Oregon Supreme Court is attached to this petition as Appendix A. The Supreme Court's order denying the state's motion for reconsideration is not reported and is attached to this petition as Appendix B. The decision of the Oregon Court of Appeals is reported at 75 Or. App. 735, 707 P.2d 1274 (1985), and is attached to this petition as Appendix C. The decision of the Employment Appeals Board of the State of Oregon is unreported and is attached as Appendix D.

JURISDICTION

The opinion of the Oregon Supreme Court was dated and filed on June 24, 1986. The court denied the state's timely petition for reconsideration by order dated September 3, 1986. Jurisdiction to review the Oregon Supreme Court's judgment in this civil case by writ of certiorari is conferred upon this Court by 28 U.S.C. § 1257(3). This petition for writ of certiorari is filed within the 90-day period prescribed by 28 U.S.C. § 2101(c), as computed in accordance with Rule 20.4 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS STATUTES AND REGULATIONS INVOLVED

The first amendment to the United States Constitution provides, in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .

Oregon Revised Statutes (Or. Rev. Stat.) § 657.176(2) (1985) provides:

> An individual shall be disqualified from the receipt of benefits until the individual has performed service in employment subject to this chapter, or for an employing unit in this or any other state or Canada or as an employe of the Federal Government, for which remuneration is received which equals or exceeds four times this individual's weekly benefit amount subsequent to the week in which the act causing the disqualification occurred, if the authorized representative designated by the assistant director finds that the individual:
>
> (a) Has been discharged for misconduct connected with work, or
>
> (b) Has been suspended from work for misconduct connected with work, or
>
> (c) Voluntarily left work without good cause, or
>
> (d) Failed without good cause to apply for available suitable work when referred by the employment office or the assistant director, or
>
> (e) Failed wthout good cause to accept suitable work when offered.

Oregon Administrative Rule (Or. Admin. R.) 471-30-038(3) (1986) provides:

> Under the provisions of ORS 657.176(2)(a) and (b), misconduct is a wilful violation of the standards of behavior which an employer has the right to expect of an employe. An act that amounts to a wilful disregard of an employer's interest, or recurring negligence which demonstrates wrongful intent is misconduct. Isolated instances of poor judgment, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience are not misconduct for purposes of denying benefits under ORS 657.176.

STATEMENT OF THE CASE

Claimant Black was employed by the Douglas County Council on Alcohol and Drug Abuse Prevention and Treatment (ADAPT), a non-profit organization, as a drug rehabilitation counselor between June and October of 1983.[1] Claimant was recovering from alcohol and drug addiction during this time, but had not used drugs or alcohol since early 1982. (Rec. 9). ADAPT's personnel policy provided that any staff member could be discharged for misuse of alcohol or other mind-altering substances. (Rec. 9, Exh. 2). When hired, claimant agreed in writing to abide by ADAPT's personnel policies and specifically agreed to avoid all substance abuse. (*Id.*). Claimant understood that ADAPT considered any use of alcohol or non-prescription drugs by a recovering person to be substance abuse. (Rec. Tr. 23, 33, 42).

Claimant is a member of the Native American Church. On September 10, 1983, he ingested a small amount of peyote during a teepee ceremony of the Native American Church. ADAPT learned of claimant's conduct, and eventually fired him when he refused to accept residential treatment for substance abuse, followed by reinstatement, or to resign. (Exh. 1).

Claimant applied to the Employment Division for unemployment benefits. At the hearing, claimant argued that he had a right to practice his religion any way he chose, including the ingestion of peyote. He further contended that the only reason he took the drug was as part of the spiritual ceremony of the Native American Church. An Employment Division referee concluded that claimant's ingestion of peyote was an "isolated instance of poor judgment" and thus not misconduct justifying denial of benefits under Or. Admin. R. 471-30-038(3) (1986).

On review of the referee's decision, the Employment Appeals Board reversed and concluded that claimant had engaged in misconduct in connection with his work. In its decision, the board made the following findings relating to claimant's religious use of peyote:

---

[1] Except where noted, the facts in the Statement of the Case are from the opinion of the Oregon Supreme Court.

> (7) On approximately September 10, 1983, the claimant attended a native American religious ceremony and ingested peyote as part of the ceremony. (3) Peyote is an illegal substance and the claimant was aware of its status. (9) The use of this drug during the ceremony was not required and was optional among the participants. (10) Prior to ingesting the drug the claimant spoke to others about the advisabilty of partaking in this portion of the ceremony. (11) After consulting with others, the claimant decided to ingest the drug.
>
> . . . .
>
> We find in the instant case that the claimant's actions constitute misconduct as defined above. He knew the employer's rules prohibited use of drugs and alcohol and also recognized that he could be terminated if he violated those policies. Although the use of an illegal drug was optional during the religious ceremony, the claimant wilfully made the choice to ingest those drugs. He did so even after he was advised by others that such a choice would perhaps be incorrect or improper. Considering the seriousness of the claimant's conduct in violating the employer's rules we find the exculpatory provisions of the Rule cannot come into play.

Claimant appealed the board's denial of benefits to the Oregon Court of Appeals, which reversed and remanded the board's decision. The court concluded that denial of unemployment benefits constituted a substantial burden on the free exercise of claimant's religion and that the state had not demonstrated a compelling interest justifying the infringement. The court believed the record was inadequate, however, to enable it to determine whether claimant's use of peyote was a bona fide religious practice entitled to protection under the first amendment. The court, therefore, ordered that the case

be remanded to the board for development of the record and a decision on this issue. (Appendix C).

The state petitioned the Oregon Supreme Court for review. Relying totally on its analysis in the companion case, *Smith v. Employment Div.*, 301 Or. 209, 721 P.2d 445 (1986), held that denial of unemployment benefits violated claimant's rights under the Free Exercise Clause of the first amendment.[2] The court disagreed with the Court of Appeals that a remand was necessary because there was no disagreement that claimant was sincere in his religious beliefs and that the ingestion of peyote is a sacrament of the Native American Church.

REASONS FOR ALLOWANCE OF WRIT

The Oregon Supreme Court comes to the unsettling conclusion in this case that the first amendment compels the state to pay unemployment benefits to an employee when: 1) the employee expressly agrees, as a condition of his employment as a drug counselor, not to use illegal drugs; 2) he willingly violates that agreement; 3) by doing so he engages in conduct incompatible with the service the employer provides; and 4) the conduct is criminal under state law.

The lower court's unlikely conclusion is not the product of sloppy application of refined first amendment principles. While the court's approach is overly mechanical, the principles with which it had to work are less than clear. When application of this Court's free exercise jurisprudence purports to compel this result, something is seriously amiss. The lower court's abortive attempt to identify and analyze the state's interest and the individual burden imposed in this case, and the result born from that analysis, graphically demonstrate that lower courts need renewed guidance in this area.

---

[2] In *Smith* the court applied this Court's recent decisions, *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707 (1981), in concluding that Smith's ingestion of peyote during a religious ceremony of the Native American Church could not be the basis for denying Smith unemployment benefits. Denial of benefits, the court said, significantly burdened Smith's freedom to practice his religion, and in the absence of a demonstrated compelling state interest for denying him benefits, was in violation of the first amendment. The state has also filed a petition for writ of certiorari in *Smith*.

The court in *Black* set forth no analysis of Black's first amendment claim, but relied on its analysis set forth in *Smith*. References in this petition to the court's analysis in *Black*, therefore, are to the *Smith* decision. The court's decision in *Smith* is attached to this petition as Appendix E.

I. This Court's analysis of first amendment free exercise claims, which the lower court attempted to apply, requires refinement or re-examination.

The analysis of free exercise claims is set forth in *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961), and repeated in various forms in *Sherbert*, 374 U.S. at 403, *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972); *Thomas*, 450 U.S. at 718-19; and *United States v. Lee*, 455 U.S. 252, 258 (1982). Review of these cases in chronological order shows how difficult it is to identify the analysis precisely and to apply it in a meaningful manner.

In *Braunfeld*, the Court articulated the test as follows:

> [I]f the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden.

366 U.S. at 607. The Court concluded that the state had the power to enact a Sunday closing law; the statute advanced the state's religiously neutral, secular goal of a universal day of rest; and the statute was narrowly drawn and imposed only an indirect burden on the free exercise right asserted. Accordingly, the state prevailed. *Id.* at 607-08

In *Sherbert*, 374 U.S. at 403, the Court stated that denial of unemployment benefits could be sustained only if Sherbert's

> disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise, or because any incidental burden on the free exercise of appellant's religion may be justified by a "compelling state interest in the regulation of a subject within the State's constitutional power to regulate. . . ." . . .

The Court held that denial of unemployment benefits constituted a "substantial infringement of [Sherbert's] First Amendment right," and, in the absence of a "paramount" state interest, the state's denial of unemployment benefits could not be sustained. *Id.* at 406-09.

In *Wisconsin v. Yoder*, 406 U.S. at 214, this Court declared that in order for Wisconsin to compel school attendance beyond the eighth grade against the Amish claim of religious interference,

> it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause.

Applying this test, the Court reversed the conviction of Amish parents who violated the compulsory school-attendance law, concluding that the state's interests did not outweigh the burden imposed on Amish religious practices. *Id.* 219-34.

In *Thomas*, 450 U.S. at 718, this Court reverted to the *Sherbert* "compelling state interest" language in examining Thomas' claim that because he had quit his job for religious reasons, the state could not deny him unemployment benefits under the first amendment. The Court characterized as "substantial" the burden that Indiana's denial of unemployment benefits imposed on Thomas' free exercise of religion. *Id.* at 187. The Court further concluded that Indiana had not demonstrated an interest "sufficiently compelling to justify the burden upon Thomas' religious liberty." *Id.* at 719.

Finally, in *United States v. Lee*, this Court rejected Lee's religious claim to an exemption from payment of the Social Security Tax. In doing so, it stated:

> The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding interest.

455 U.S. at 257. The Court accepted Lee's contention that compulsory participation in the Social Security system is forbidden by the Amish faith and, therefore, interferes with his free exercise rights. *Id.* at 257. The Court nonetheless concluded that the government's interest "in assuring mandatory and continuous participation in and contribution to the Social Security system" was "very high" and sufficient to overbalance Lee's first amendment claim to an exemption. *Id.* at 258-59.

The analyses used in these cases cannot be reconciled. Under *Braunfeld v. Brown*, 366 U.S. at 607, if the state regulation is narrowly drawn, religiously neutral, within the state's power and imposes only an indirect burden, the regulation does not violate the Free Exercise Clause. This analysis requires no weighing of the state's interest against the burden imposed on individual regligious practices. *Wisconsin v. Yoder*, 406 U.S. at 214, and *United States v. Lee*, 455 U.S. at 257, in contrast, employ a true balancing test. Under these decisions, the state's interest must be sufficiently important to "override" the burden on individual religious freedoms. *Sherbert* and *Thomas* enunciate yet a third test and require the state to demonstrate a compelling state interest whenever there exists any "inroad on religious liberty." *Thomas*, 450 U.S. at 218. *Accord Sherbert*, 374 U.S. at 403.

From this constellation of confusing and contradictory precedent, the Oregon court selected and relied exclusively on *Sherbert* and *Thomas*. It then reached a patently wrong result.

It may be that the "compelling state interest" test announced in those cases is not a correct analysis, and that *Sherbert* and *Thomas* were a false step. Even if, however, some sort of balancing or "compelling state interest" analysis properly effectuates the first amendment free exercise principle, the analysis is incomplete. Wholly absent from this court's prior decisions is any guidance on how to measure the burden on a claimant's religion and how to assess the state's interest. Thus, as the Oregon Supreme Court analyzes the problem, there is no possibility of a different result: the state's interest will always be monetary only; a claimant's religious freedom will always be significantly burdened. The result is a *per se* rule that any employee who is discharged from work for misconduct that is religiously motivated must always be paid unemployment benefits. This case demonstrates the absurdity of that result, and the need for further guidance from this court.

II. Important differences between *Sherbert* and *Thomas* and this case, in terms of the state's interest and the burden on claimant, compel a different result here.

Perhaps the most glaring omission in the Oregon Supreme Court's opinion is its refusal to attach analytic importance to the criminality of peyote use. *See Smith v. Employment Div.*, 301 Or. at 218-19. When that factor is considered in calculating a claimant's free exercise interest, the denial of benefits cannot be viewed as any burden on religious freedom, or at most it must be deemed an insubstantial burden.[3]

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[3] In discounting the importance of the criminality of claimant's conduct, the Oregon Supreme Court in its opinion quoted from the state's memoran-

(Footnote continued on next page)

Claimant's conduct of ingesting peyote was not protected religious activity because the state previously and properly had prohibited that conduct by its penal laws. Possessing peyote is a Class B felony under Oregon law and is punishable by up to a maximum sentence of ten-years imprisonment. Or. Rev. Stat. §§ 475.992(4)(a) (1985); 161.605(2) (1985) Oregon's criminal prohibition is absolute. There is no constitutionally compelled exemption for religious peyote use. *Smith v. Employment Division*, 301 Or. at 219, n. 2, (citing *State v. Soto*, 21 Or. App. 794, 537 P.2d 142, *cert. denied*, 424 U.S. 955 (1976)). When there is no lawful ability to engage in conduct even when the conduct is religiously motivated, there can be no free-exercise interest to assert.[4]

The fact of criminality, perhaps more than any other, puts this case in stark contrast to both *Sherbert* and *Thomas*. Indeed, in *Sherbert* this Court recognized that "[Sherbert's] conscientious objection to Saturday work con-

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(Footnote continued from previous page)

dum submitted to the court in response to the court's written questions. 301 Or. at 219. This quote, taken out of context, suggested that the state had conceded that the illegality of claimant's conduct was irrelevant for purposes of the court's first amendment analysis. However, the state made no such concession, and in fact argued in both its initial petition for review to the Supreme Court and its petition for reconsideration that the criminality of claimant's conduct bore heavily on a proper first amendment analysis.

[4] In *Wisconsin v. Yoder*, 406 U.S. at 220 (1972), this Court recognized the converse of this basic point:

> But to agree that religiously grounded conduct must *often* be subject to the broad police power of the state is not to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability. . . .

If protected religious activity is beyond the power of the state to regulate, then the converse proposition must also be true: conduct which the court has the power to regulate must not be protected.

stitutes no conduct prompted by religious principles of a kind within the reach of state legislation." 374 U.S. at 403. Thus, the Court recognized that the state could not directly regulate Sherbert's religious behavior, sabbatarianism, and the issue was whether the state could indirectly affect her conduct by the denial of benefits. However, where as here the state has directly regulated claimant's behavior by prohibiting it, no additional burden results from the denial of benefits. Loss of unemployment benefits simply cannot be said to be a significant burden on an individual's freedom to engage in conduct that is separately punishable by ten years in prison.[5]

In assessing the burden of disqualification from unemployment benefits on claimant's religious practices, the court below also ignored another burden—the economic repercussions resulting from loss of claimant's employment. A stronger disincentive to misconduct than loss of unemployment benefits is the loss of the job itself. While unemployment benefits provide some comfort to a person out of work, they do not begin to replace lost wages.[6] For a person who relies on his or her monthly paycheck for subsistance, and whose religious practices conflict with legitimate policies of his or her employer, the significant burden on the religious practice is the loss of the paycheck, not the disqualification from unemployment benefits. For the person who need not rely on his or her monthly paycheck, and for whom loss of a job is not a financial concern, it is unlikely that loss of unemployment benefits will play any role in the individual's decision whether to engage in the religious practice. In either case, denial of unemployment benefits probably receives little or no thought as the individual decides whether to engage in the religious practice. Denial of unemployment benefits accordingly does not significantly burden an employee's religious practice and was not a burden here.

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[5] Indeed, a person convicted of a crime and imprisoned would be ineligible for benefits anyway because the person would be unavailable for work. *See* Or. Rev. Stat. § 657.155(1)(c) (1985).

[6] For example, at present the maximum weekly benefit amount for which an individual can qualify, regardless of the amount of wages earned, is $216. *See* Or. Rev. Stat. § 657.150(4)(b)(E) (1985); State of Oregon, Employment Division, UI Pub. 196-D (7-86). Receipt of such weekly benefits would place a family of four barely above the poverty level.

In assessing the state interest at stake, the court denigrated the state's legitimate policy of not awarding unemployment benefits to employees who wilfully disregard work-related employer rules. The state's interest in discouraging employees from engaging in misconduct connected with their employment is an appropriate and important governmental interest. Denying unemployment benefits to employees who are fired for engaging in misconduct is a narrowly drawn means of achieving that interest.[7]

Furthermore, the state has an interest in applying this rule uniformly to all employees without regard for the motive that leads an employee to violate the employer's rule. A general disqualification from benefits for misconduct prevents the need for government to probe into the sincerity and strength of the religious motivations. *See Braunfeld v. Brown*, 366 U.S. at 609 (the state has an interest in not running "afoul" of the spirit of the religious guarantees by making inquiries about religious beliefs and their sincerity).

The court below also ignored that the conduct at issue in this case is within the power of the state to regulate and, indeed, has been regulated by the state through the enactment of criminal penalties for engaging in the conduct. The very

existence of the Oregon statute criminalizing and severely sanctioning peyote use evidences the legislative judgment that use of hallucinogens poses grave danger to the health and well-being of Oregon citizens. That policy unquestionably is undermined by a result that rewards the same criminal conduct with a special financial benefit.

In summary, the Oregon court in this case failed to assess properly the complexity of calculating the competing interests. This Court's opinions do not directly address the critical nuances of determining the strength of the state's interest and the degree the burden, if any, on religious practice. Indeed, *Sherbert* and *Thomas* appear to foreclose recognition of those nuances. The result in this case demonstrates that the lower courts need additional guidance in evaluating and comparing the competing interests which serve as cornerstones of first amendment free exercise clause analysis. This Court should seize the opportunity presented by this case to refine or, perhaps, re-examine those principles so that "the professed doctrines of religious belief [do not become] superior to the law of the land, and, in effect . . . permit every citizen to become a law unto himself." *See Reynolds v. United States*, 98 U.S. 145, 167 (1879).

CONCLUSION

For the reasons set forth above, this Court should grant the petition for certiorari to review the significant issues presented and reverse the judgment of the court below.

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[7] The importance of the state's interest here and the significance of the issue beyond this particular case are underscored by the fact that like Oregon, most states have rules that disqualify workers from receiving unemployment benefits if the worker is discharged for wilful or deliberate misconduct connected with work. National Foundation for Unemployment Compensation and Workers' Compensation, *Highlights of State Unemployment Compensation Laws* 58 (January 1986).

Respectfully submitted,
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APPENDIX A

IN THE SUPREME COURT OF THE
STATE OF OREGON
BLACK,
Respondent on review,
v.
EMPLOYMENT DIVISION et al,
Petitioners on review.
(EAB 84-AB-161; CA A31186; SC S32482)

On review from the Court of Appeals.*

Argued and submitted April 1, 1986.

James E. Mountain, Jr., Solicitor General, Salem, argued the cause for petitioner on review Employment Division. With him on the petition for review were Dave Frohnmayer, Attorney General, and Michael D. Reynolds and Jeff Bennett, Assistant Attorneys General, Salem.

Eldon F. Caley, Roseburg, waived oral argument for petitioner on review ADAPT.

David Morrison, of Heiling & Morrison, P.C., Roseburg, argued the cause for respondent on review.

David M. Gordon, of Thorp, Dennett, Pury, Golden and Jewett, P.C., Springfield, filed a brief *amicus curiae* on behalf of American Civil Liberties Union.

Before Peterson, Chief Justice, and Lent, Linde, Campbell, Carson and Jones, Justices.

JONES J.

The Court of Appeals is affirmed as modified; case remanded to the Employment Appeals Board for issuance of an order not inconsistent with this opinion.

JONES, J.

This is a companion case to *Smith v. Employment Division*, 301 Or 209, ___ P2d ___ (1986). Claimant appealed an Employment Appeals Board (EAB) order denying unemployment compensation benefits. Claimant's employer discharged him for ingesting peyote during a Native American Church ceremony.

The employer, Douglas County Council on Alcohol and Drug Abuse Prevention and Treatment (ADAPT), hired claimant as a resident assistant September 12, 1982. ADAPT's policy is to suspend or discharge employes who abuse alcohol or other drugs because it considers its employes role models for persons they treat. Claimant had a history of substance abuse but had not used drugs since early 1982. After two promotions, claimant became a drug rehabilitation counselor in June 1983.

Claimant, like Smith in the companion case, belongs to the Native American Church and attends services weekly. During a Church ceremony on September 10, 1983, claimant ingested a small amount of peyote "for spiritual reasons, as a communion." When claimant's supervisor discovered that claimant had ingested peyote, he told claimant to choose between resignation, discharge or entry into an inpatient treatment program. Contending that his ingesting of peyote was not a relapse into drug abuse, claimant rejected the treatment offer, and on October 3, 1983, ADAPT discharged him. John Gardin, ADAPT's executive director, stated that "we would have taken the same action had the claimant consumed wine at a Catholic ceremony or any drug anywhere. It would be the same result."

When the Employment Division denied benefits, claimant requested a hearing. At the hearing, claimant argued that he had a right to practice his religion any way he chose, including the ingestion of peyote, and further asserted that the only reason he took the drug was a part of the spiritual ceremony at

the Native American Church. After the hearing, the referee concluded that claimant's ingestion of peyote was "an isolated instance of poor judgment," and therefore not misconduct justifying denial of benefits. OAR 471-30-038(3).

After the referee's decision for claimant, the employer requested review by EAB, which denied benefits. The EAB order referred to claimant's religious use of peyote as follows:

> "(7) On approximately September 10, 1983 the *claimant attended a native American religious ceremony and ingested peyote as part of the ceremony.* (8) Peyote is an illegal substance and the claimant was aware of its status. (9) The use of this drug during the ceremony was not required and was optional among the participants. (10) Prior to ingesting the drug the claimant spoke to others about the advisability of partaking in this portion of the ceremony. (11) After consulting with others, the claimant decided to ingest the drug." (Emphasis added.)

and concluded.

> "We disagree with the referee and find that the claimant was discharged for misconduct in connection with his work. The Administrative Rule [OAR 471-30-038] cited by the referee, sets out that misconduct is a wilful violation of the standards of behavior which an employer has the right to expect of an employee and is an act that amounts to a wilful disregard of the employer's interests.
>
> "We find in the instant case that the claimant's actions constitute misconduct as defined above. He knew the employer's rules prohibited use of drugs and alcohol and also recognized that he could be terminated if he violated those policies. Although the use of an illegal drug was optional during the religious ceremony, the claimant wilfully made the choice to ingest those drugs.[1] He did so even after he was advised by

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[1] As we noted in *Smith v. Employment Division*, 301 Or 209, ___ P2d ___ (1986), whether a particular religious practice or belief is optional or universally accepted by members of a particular religion is irrelevant to the federal analysis. *See Thomas v. Review Bd.*, 450 US 707, 715-16, 101 S Ct 1425, 67 L Ed 2d 624 (1981) ("the guarantee of free exercise is not limited to beliefs which are shared by all the members of a religious sect").

> others that such a choice would perhaps be incorrect or improper. Considering the seriousness of the claimant's conduct in violating the employer's rules we find the exculpatory provisions of the Rule cannot come into play."

The question in this case, as in *Smith v. Employment Division, supra*, is whether the denial of unemployment compensation benefits because claimant used peyote in a Native American Church ceremony unconstitutionally infringes upon his right to the free exercise of his religion. As in *Smith*, we hold that denial of unemployment compensation benefits did not violate Article I, sections 2 and 3, of the Oregon Constitution, but did violate the free exercise clause of the First Amendment to the United States Constitution.[2]

Although the referee failed to make precise factual findings, we infer from the EAB's somewhat anemic conclusions that the Native American Church is a recognized religion, that peyote is the sacrament of the Church, and that claimant was a member of the Church and an active participant in the religious ceremonies of the Church.

Other courts have noted the role of peyote in the ceremonies and practices of the Native American Church. For instance, in *People v. Woody*, 61 Cal 2d 716, 720-21, 40 Cal Rptr 69, 394 P2d 813 (1964), the California Supreme Court wrote:

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[2] Article I, sections 2 and 3, of the Oregon Constitution provide:

> "Section 2. Freedom of worship. All men shall be secure in the Natural right, to worship Almighty God according to the dictates of their own consciences.
>
> Section 3. Freedom of religious opinion. No law shall in any case whatever control the free exercise, and enjoyment of religeous (sic) opinions, or interfere with the rights of conscience."

The federal First Amendment provides in relevant part:

> "Congress shall make no law respecting an establishment of religion or prohibit the free exercise thereof * * *."

> "Peyote, as we shall see, plays a central role in the ceremony and practice of the Native American Church, a religious organization of Indians. Although the church claims no official prerequisites to membership, no written membership rolls and no recorded theology, estimates of its membership range from 30,000 to 250,000, the wide variance deriving from differing definitions of a 'member.' As the anthropologists have ascertained through conversations with members, the theology of the church combines certain Christian teachings with the belief that peyote embodies the Holy Spirit and that those who partake of peyote enter into direct contact with God.
>
> "Peyotism discloses a long history. A reference to the religious use of peyote in Mexico appears in Spanish historical sources as early as 1560. Peyotism spread from Mexico to the United States and Canada; American anthropologists describe it as well established in this country during the latter part of the nineteenth century. Today, Indians of many tribes practice Peyotism. Despite the absence of recorded dogma, the several tribes follow surprisingly similar ritual and theology; the practices of Navajo members in Arizona practically parellel those of adherents in California, Montana, Oklahoma, Wisconsin, and Saskatchewan.
>
> "The 'meeting,' a ceremony marked by the sacramental use of peyote, composes the cornerstone of the peyote religion. The meeting convenes in an enclosure and continues from sundown Saturday to sunrise Sunday. To give thanks for the past good fortune or find guidance for future conduct, a member will 'sponsor' a meeting and supply to those who attend both the peyote and the next morning's breakfast. The 'sponsor' usually but not always the 'leader,' takes charge of the meeting; he decides the order of events and the amount of peyote to be consumed. Although the individual leader exercises an absolute control of the meeting, anthropologists report a striking uniformity of its ritual.
>
> "A meeting connotes a solemn and special occasion. Whole families attend together, although chil-

> dren and young women participate only by their presence. Adherents don their finest clothing, usually suits for men and fancy dresses for the women, but sometimes ceremonial Indian costumes. At the meeting the members pray, sing, and make ritual use of drum, fan, eagle bone, whistle, rattle and prayer cigarette, the symbolic emblems of their faith. The central event, of course, consists of the use of peyote in quantities sufficient to produce an hallucinatory state.
>
> "At an early but fixed stage in the ritual the members pass around a ceremonial bag of peyote buttons. Each adult may take four, the customary number, or take none. The participants chew the buttons, usually with some difficulty because of extreme bitterness; later, at a set time in the ceremony any member may ask for more peyote; occasionally a member may take as many as four more buttons. At sunrise on Sunday the ritual ends; after a brief outdoor prayer, the host and his family serve breakfast. Then the members depart. By morning the effects of the peyote disappear; the users suffer no after-effects.
>
> "Although peyote serves as a sacramental symbol similar to bread and wine in certain Christian churches, it is more than a sacrament. Peyote constitutes in itself an object of worship; prayers are directed to it much as prayers are devoted to the Holy Ghost. On the other hand, to use peyote for nonreligious purposes in sacrilegious. Members of the church regard peyote also as a 'teacher' because it induces a feeling of brotherhood with other members; indeed, it enables the participant to experience the Deity. Finally, devotees treat peyote as a 'protector.' Much as a Catholic carries his medallion, an Indian G.I. often wears around his neck a beautifully beaded pouch containing one large peyote button." (Footnote omitted.)

Of course, we quote *Woody* for illustration only and not as a substitute for administrative findings and conclusions.

The Court of Appeals, apparently troubled by the lack of administrative findings, remanded this case to EAB for findings of fact concerning the following questions:

> "(1) Is the ingestion of peyote a sacrament of the Native American Church?
>
> "(2) Is this claimant a member of that church?
>
> "(3) Concerning his use of peyote, were claimant's religious beliefs sincerely held?" *Black v. Employment Division*, 75 Or App 735, 743, 707 P2d 1274 (1985) (footnotes omitted).

We agree that the agency findings are meager, but we see no reason to remand because there is no genuine dispute that the ingestion of peyote is a sacrament of the Native American Church, that the claimant was a member of that Church and that his religious beliefs were sincerely held.

The Court of Appeals is affirmed as modified; the case is remanded to the Board for issuance of an order not inconsistent with this opinion.

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF OREGON

[dated September 3, 1986]

GALEN W. BLACK,	)	
	)	
Respondent on Review,	)	ORDER DENYING
	)	RECONSIDERATION
	)	
v.	)	
	)	CA A31186
EMPLOYMENT DIVISION,	)	
DEPARTMENT OF	)	
HUMAN RESOURCES,	)	SC S32482
RAY THORNE, Administrator,	)	
	)	
Petitioner on Review,	)	
	)	
and ADAPT,	)	
	)	
Respondent (below).	)	

The Court has considered the petition for reconsideration and ORDERS that it be denied.

DATED: September 3, 1986

/s/ EDWIN J. PETERSON
CHIEF JUSTICE

[copy distribution omitted in printing]

GILLETTE, J. NOT PARTICIPATING

APPENDIX C

IN THE COURT OF APPEALS OF THE
STATE OF OREGON
BLACK,
Petitioner,
v.
EMPLOYMENT DIVISION et al,
Respondents.
(84-AB-161; CA A31186)

In Banc

Judicial Review from Employment Appeals Board.

Argued and submitted October 31, 1984; resubmitted in banc June 6, 1985.

David Morrison, Oregon Legal Services Corp., Roseburg, argued the cause and filed the brief for petitioner.

Jeffrey Bennett, Assistant Attorney General, Salem, argued the cause for respondent Employment Division. With him on the brief were Dave Frohnmayer, Attorney General, and James E. Mountain, Jr., Solicitor General, Salem.

Eldon F. Caley, Roseburg, filed the brief for respondent ADAPT.

ROSSMAN, J.

Reversed and remanded for reconsideration.

Buttler, J., dissenting.

ROSSMAN, J.

Claimant appeals an Employment Appeals Board order which disqualified him from receiving unemployment compensation.[1] Because EAB failed to consider claimant's principal argument, we reverse and remand for reconsideration.

Beginning in September, 1982, claimant was employed by a drug and alcohol treatment clinic as a resident assistant. He has a history of substance abuse but has been drug and alcohol free since early 1982. Employer's personnel rules provide that misuse or abuse of alcohol or other mind-altering substances may constitute grounds for suspension. Claimant signed a copy of those rules on his second day of employment. Employer contends it also was understood that, for recovering alcoholics and drug addicts, any use of drugs or alcohol was considered abuse. During the course of his employment, claimant was promoted twice, the last time to a counselor position in June, 1983.

Claimant is a member of the Native American Church and attends services weekly. At the hearing, he indicated that he first came in contact with the church through his job. He began attending regularly around March, 1983, approximately six months after he began working for employer. In September, 1983, as part of a Native American Church ceremony, claimant ingested a small amount of peyote, a cactus "button" containing the hallucinogen mescaline, which is illegal in Oregon. ORS 475.005. He took it for spiritual reasons, as a communion. There was testimony that the amount was too small to produce any hallucinogenic reaction. Before participating in the church ceremony, claimant consulted with friends and co-workers about the advisability of ingesting peyote, given his history of drug and alcohol abuse. Claimant testified that he was not *required* by the church to take peyote, but that it was a personal decision.

When employer learned of claimant's actions, he was asked to submit to an evaluation by a professional social worker, who recommended that claimant be placed in a residential care facility for an intensive program of personal counseling. Claimant refused to follow the recommendation because he disagreed with employer's opinion that his religious practices were a sign of relapse. Thereafter, he was terminated for intentional violation of employer rules.

Claimant's initial application for unemployment compensation was denied. Pursuant to his request, a hearing was held, and the referee allowed his application after concluding that claimant's use of peyote was an isolated instance of poor judgment. OAR 471-30-038(3). Employer requested review by EAB, which issued an order that denied benefits. The order provided:

> "FINDINGS OF FACT. (1) The employer is a non-profit organization which engages in operating various programs for the treatment and prevention of alcohol and drug abuse. (2) The claimant was employed by this employer from June of 1983 until October of 1983 as a drug and alcoholism rehabilitation counsellor. (3) He was recovering from alcohol and drug addiction during this period of time, and had refrained from the use of alcohol and/or drugs.
>
> "(4) The employer's rules and policies specify that employees will avoid substance abuse which involves alcohol and drugs. (5) Those policies and rules also provide for a suspension and termination if a staff member misuses alcoholic beverages and/or other mind altering drugs. (6) The claimant was aware of those employer rules.
>
> "(7) On approximately September 10, 1983 the claimant attended a native American religious ceremony and ingested peyote as part of the cere-

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[1] At the outset, it should be noted that this proceeding does not challenge employer's decision to discharge claimant, only the state's denial of unemployment benefits.

mony. (8) Peyote is an illegal substance and the claimant was aware of its status. (9) The use of this drug during the ceremony was not required and was optional among the participants. (10) Prior to ingesting the drug the claimant spoke to others about the advisability of partaking in this portion of the ceremony. (11) After consulting with others, the claimant decided to ingest the drug. (12) He does not deny doing so.

"(13) When this came to the employer's attention he was asked to submit to an evaluation by a professional social worker. (14) He was placed on an indefinite mandatory sick leave and vacation beginning Setember 19 and did not work after that date. (15) On approximately October 3, 1983, the employer received the evaluation from the social worker which recommended that the claimant be placed in a residential inpatient care facility for alcohol and drug abuse, or that he undergo an intensive program of personal counselling. (16) The claimant refused these options. (17) When the claimant refused these various treatment options he was terminated for violation fo [sic] the employer's rules as set out above.

"CONCLUSION AND REASONS: We disagree with the referee and find that the claimant was discharged for misconduct in connection with his work. The Administrative Rule cited by the referee sets out that misconduct is a wilful violation of the standards of behavior which an employer has the right to expect of an employee and is an act that amounts to a wilful disregard of the employer's interests.

"We find in the instant case that the claimant's actions constitute misconduct as defined above. He knew the employer's rules prohibited the use of drugs and alcohol and also recognized that he could be terminated if he violated those policies. Although the use of an illegal drug was optional during the religious ceremony, the claimant wilfully made the choice to ingest those drugs. He did so even after he was advised by others that such a choice would perhaps be incorrect or improper. Considering the seriousness of the claimant's conduct in violating the employer's rules we find the exculpatory provisions of the Rule cannot come into play."

Claimant argued before EAB, as he argues here, that his ingestion of peyote is a constitutionally protected religious act which cannot constitute the basis for disqualification. He presented evidence to support that argument. Nevertheless, EAB's "findings of fact" and "conclusions and reasons" are not sufficiently responsive to claimant's constitutional claims. The case must be remanded for reconsideration. *See Wasson v. AFSD*, 59 Or App 634, 640, 652 P2d 358 (1982); *Hillcrest Vineyard v. Bd. of Comm. Douglas Co.*, 45 Or App 285, 608 P2d 201 (1980). We turn now to a discussion of the nature of EAB's inquiry on remand.

THE CONSTITUTIONAL QUESTION

The question in this case is whether the denial of unemployment compensation benefits based on claimant's use of peyote in a Native American Church ceremony is an unconstitutional intrusion on his right to free exercise of religion.

The initial responsibility for answering the question falls on claimant. Because he invokes the protection of Article I, sections 2 and 3, of the Oregon Constitution, and the Free Exercise Clause of the First Amendment to the United States Constitution,[2] he must establish that the act in question is a religious expression and that it is being substantially burdened by state law or action. If he establishes that, then the responsibility for resolving the question shifts to the state, which can only justify a burden placed on the religious expression by demonstrating that it is the least restrictive means of achieving a compelling state interest.[3] *Wisconsin v. Yoder*, 406 US 205, 92 S Ct 1526, 32 L Ed 2d 15 (1972); *Sherbert v. Verner*, 374 US 398, 403, 83 S Ct 1790, 10 L Ed 2d 965 (1963).

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[2] The Oregon constitutional provisions guarantee the right of persons to "worship according to the dictates of their own consciences" and that "[n]o law shall in any case whatever control the free exercise, and enjoyment of religeous [*sic*] opinions, or interfere with the rights of conscience." The Free Exercise Clause of the First Amendment provides that "Congress shall make no law prohibiting the free exercise" of religion.

Thus, three separate and distinct issues emerge. Each must be addressed before the ultimate question in this case can be decided:

(1) Was claimant's ingestion of peyote a *religious act*?

(2) Was the denial of benefits a *substantial burden*?

(3) Has the state demonstrated that the denial of benefits serves a *compelling state interest* by the least restrictive means?

Because we are able to resolve the latter two issues on the record before us, without the necessity of remand, we will address them initially.

First, we hold that the denial of unemployment benefits constitutes a substantial burden. In *Sherbert v. Verner, supra*, a sabbatarian was discharged for refusing to work on Saturday. Her refusal eventually resulted in her disqualification from unemployment benefits. The Supreme Court reversed the denial, holding that there was a significant coercive effect on the practice of religion, because the claimant was forced to choose between state benefits on the one hand and following her religious beliefs on the other. "Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship." 374 US at 404. In *Thomas v. Review Bd., Ind. Empl. Sec. Div.*, 450 US 707, 101 S Ct 1425, 67 L Ed 2d 624 (1981), the *Sherbert* rationale was reiterated. There, a Jehovah's Witness was denied benefits after quitting his job, because it required him to work in the production of military weapons, which would have violated his religious beliefs. Under these abundantly clear and controlling authorities, it is beyond dispute that to deny someone unemployment benefits for engaging in *bona fide* religious conduct places a substantial burden on the exercise of his rights.

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[3] Although claimant relies on both the United States and Oregon Constitutions, he does not advance a principled argument based on the Oregon Constitution, nor does he suggest that it offers greater protection than the federal constitution. He supports his argument only with First Amendment principles. Accordingly, we refer only to those principles in discussing his claim.

Second, we hold that the state has not demonstrated a compelling interest justifying the infringement. The only interest advanced by the state in this case is its

> " interest in protecting the Unemployment Compensation Fund from depletion by those who are undeserving due to their own conduct, e.g. those who quit or are fired without good reason."

That interest falls far short of compelling. In both *Thomas* and *Sherbert*, the integrity of the respective unemployment funds was advanced as compelling. The contentions were rejected in each instance. *Thomas v. Review Bd., Ind. Empl. Sec. Div., supra*, 450 US at 718-19; *Sherbert v. Verner, supra*, 374 US at 407.

We now come to the *third* and dispositive issue to be addressed: whether claimant's use of peyote was a *bona fide* religious practice deserving of constitutional protection. It is because of the need for further factfinding on this issue that we are remanding this case back to the Board.

To some, peyotism might seem unconventional. However, we cannot ignore a fundamental constitutional principle simply because the facts of the case surround an obscure church whose mode of worship may be controversial and little understood. In *United States v. Ballard*, 322 US 78, 87, 64 S Ct 882, 88 L Ed 1148 (1944), the Supreme Court noted the breadth of First Amendment protections:

> " The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views. Man's relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views. The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain. "

The primary trust of the state's contention, that the use of peyote is not a *bona fide* religious practice, centers on the fact that claimant's ingestion of peyote was not *required* by his church. Although there is authority to support a finding that the use of peyote is the "sine qua non" of the Native American Church, *see, e.g., People v. Woody*, 61 Cal2d 716, 721-22, 40 Cal Rptr 69, 394 P2d 813 (1964), the finding is unnecessary, because the constitution protects more than the "theological heart" of a religion. Were it otherwise, the state would be given a license to determine what is important to a religion and what is not.

In *Thomas v. Review Bd., Ind. Empl. Sec. Div., supra*, a claimant was denied unemployment benefits for quitting his job after he was reassigned to a position requiring him to work in the production of military weapons. The Supreme Court held that his refusal to produce weapons was a protected exercise of his religious freedom, even though other members of his church were willing to do so. 450 US at 715-16. The court stated that constitutional protections extend to conduct

engaged in by less than all of the members of a faith; in other words, they extend to conduct that is not mandatory. The protection of the constitution does not depend on the theological importance of the disputed conduct. "Rather constitutional protection is triggered by the fact that it is religious." *Unitarian Church West v. McConnell*, 337 F Supp 1252, 1257 (ED Wis 1972).

Furthermore, judicial examination of the validity or truth of religious beliefs is foreclosed by the First Amendment. The courts only may inquire into whether a claimant holds his beliefs in good faith or whether he seeks to wear the mantle of religious immunity merely as a cloak for illegal activities.[4] *United States v. Ballard, supra.* That is, the issue is whether a claimant's beliefs are sincerely held. When an employe's genuine exercise of religious beliefs clashes with an employer's interest, there is no basis for denial of benefits.

Under these principles of law, it becomes EAB's task to determine whether this claimant's ingestion of peyote was a religious act. Before that conclusion can be made, EAB needs to make findings of fact that answer the following three questions:

> (1) Is the ingestion of peyote a sacrament of the Native American Church?[5]

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[4] Some practices are so unusual that by their very nature they suggest that sincerely held underlying religious beliefs may be lacking. *See United States v. Kuch*, 288 F Supp 439 (D DC 1968), in which members of the Neo-American Church were charged with violation of laws concerning marijuana and LSD. The church called its members "Boo Hoos," its theme song was "Puff, the Magic Dragon," and its motto was "Victory over Horseshit." The district court rejected the constitutional claim and said that the group was formed merely to use and enjoy drugs.

[5] Although EAB must nevertheless make a finding of fact on this matter, in the record now before us no one argues that peyotism is not religious. References to it appear as early as 1560. The Native American Church has adherents in many parts of the United States and in Canada. Its membership has been estimated at up to 250,000. The theology of the

(Footnote continued on next page)

(2) Is this claimant a member of that church?[6]

(3) Concerning his use of peyote, were claimant's religious beliefs sincerely held?

If EAB resolves all three questions affirmatively, then it must conclude that claimant's ingestion of peyote was a religious act; and, if that is the conclusion, EAB cannot deny claimant unemployment benefits in this case.

THE SOTO CASE

In 1975, this court refused to allow a criminal defendant, who was charged with criminal possession of peyote,[7] to present evidence of his religious beliefs as a defense. *State v. Soto*, 21 Or App 794, 537 P2d 142, *rev den* (1975), *cert den* 424 US 955 (1976).[8] The state argues that *Soto* controls this case. We do not believe that it does.

Despite a strongly worded dissent, the majority in *Soto* rejected defendant's assertion and presumed a compelling state's interest in protecting the health and safety of the public from the fact that use and possession of peyote were illegal. 21 Or App at 798. Accordingly, we rejected defendant Soto's religious defense and allowed his conviction to stand.

Here, claimant was terminated for a violation of an employer rule prohibiting the use of drugs or alcohol by former abusers of those substances. The fact that there is an independent set of criminal laws which made his conduct coincidentally illegal is irrelevant, because he was not terminated for breaking the law. The question is not whether the state's action can be justified by the compelling interest of protecting the health and interest of the public. That justification is not advanced, nor could it be, because the relevant state action is not a criminal charge, as in *Soto*, but the denial of unemployment benefits. As noted above, the question is whether the state has a compelling interest in denying claimant's benefits because he violated a personnel rule. *Soto* did not address that question. Therefore, the holding in *Soto* is inapposite.[9]

Reversed and remanded for reconsideration

BUTTLER, J., dissenting.

Although I agree with the majority's discussion of a person's constitutional right to practice his religion, the question here is whether petitioner's ingestion of peyote, a controlled substance, is a protected practice just because it is a part of the ritual of the Native American Church to which he belongs.

The majority recognize correctly that a religious practice, as opposed to beliefs, may be prohibited if the state has a compelling interest in doing so. In *State v. Soto*, 21 Or App 794, 537 P2d 142, *rev den* (1975), *cert den* 424 US 955 (1976), we held that the state has a compelling interest in prohibiting the use of peyote that outweighed the defendant's interest in practicing his religion as a member of the Native American

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(Footnote continued from previous page)

church is based on many Christian tenets, as well as the belief that peyote embodies the Holy Spirit and that those who partake of peyote enter into direct contact with God. *See People v. Woody*, 61 Cal2d 716, 40 Cal Rptr 69, 394 P2d 813 (1964).

[6] It does not seem to be disputed that claimant was a member of the Native American Church.

[7] The defendant had been charged under *former* ORS 167.207 (*repealed by* Or Laws 1977, ch 745, § 54) and *former* ORS 475.5010(1)(b) [sic] (*repealed by* Or Laws 1977, ch 745, § 54).

[8] Although *State v. Soto*, 21 Or App 794, 537 P2d 142, *rev den* (1975), *cert den* 424 US 955 (1976), is consistent with some early cases like *State v. Big Sheep*, 75 Mont 219 243 P 1067 (1926), it appears to be a distinct exception to the current trend in western states with significant Indian populations. In *Peyote Way Church of God, Inc. v. Smith*, 742 F2d 193 (5th Cir 1984); *State v. Whittingham*, 19 Ariz App 27, 504 P2d 950 (1973); *People v. Woody, supra* and *Whitehorn v. State*, 561 P2d 539 (Okla 1977) defendants charged with criminal offenses involving peyote successfully raised religious freedom as a defense. Moreover, a number of jurisdictions have adopted exemptions to their drug control laws for sacramental use of peyote in *bona fide* religious ceremonies. *See, e.g.*, 21 USC § 812 (1970).

[9] Further, *Soto* predates the American Indian Religious Freedom Act, 42 USC § 1996. In the light of this federal legislative policy, the holding in *Soto* may bear reexamination.

Church. So long as *Soto* remains the law, plaintiff does not have a protectible constitutional right on which to base his claim.

The Oregon Supreme Court denied review in *State v. Soto, supra*, and the United States Supreme Court denied ceriorari. If that decision is to be overruled, I do not think that this is the case in which to do so.

I would affirm the Board; therefore, I dissent.

Joseph, C.J., and Warden, J., join in this dissent.

APPENDIX D

STATE OF OREGON

MC 485.45

EMPLOYMENT APPEALS BOARD
1675 Winter St., NE, Salem, OR 97303

APPEALS BOARD DECISION
84-AB-1217

#64

CLAIMANT	EMPLOYER
GALEN W. BLACK 1185 NW Hicks #2 Roseburg, OR 97470	ADAPT PO Box 1121 Roseburg, OR 97470
SSA# 514 50 6337	A-2-a-III-VII; B-1-b-2-b D-1-3-b 0240d D/S 30

The above matter is before us for consideration upon the filing of an application for review.

Referee Gruber entered Referee Decision 83-E-2368 on December 8, 1983, reversing an administrative decision to find claimant not disqualified under ORS 657.176(2)(a). The employer filed an application for review on December 20, 1983.

FINDINGS OF FACT. (1) The employer is a non-profit organization which engages in operating various programs for the treatment and prevention of alcohol and drug abuse. (2) The claimant was employed by this employer from June of 1983 until October of 1983 as a drug and alcoholism rehabilitation counsellor. (3) He was recovering from alcohol and drug addiction during this period of time, and had refrained from the use of alcohol and/or drugs.

(4) The employer's rules and policies specify that employees will avoid substance abuse which involves alcohol and

drugs. (5) Those policies and rules also provide for a suspension and termination if a staff member misuses alcoholic beverages and/or other mind altering drugs. (6) The claimant was aware of those employer rules.

(7) On approximately September 10, 1983 the claimant attended a native American religious ceremony and ingested peyote as part of the ceremony. (8) Peyote is an illegal substance and the claimant was aware of its status. (9) The use of this drug during the ceremony was not required and was optional among the participants. (10) Prior to ingesting the drug the claimant spoke to others about the advisability of partaking in this portion of the ceremony. (11) After consulting with others, the claimant decided to ingest the drug. (12) He does not deny doing so.

(13) When this came to the employer's attention he was asked to submit to an evaluation by a professional social worker. (14) He was placed on an indefinite mandatory sick leave and vacation beginning September 19 and did not work after that date. (15) On approximately October 3, 1983, the employer received the evaluation from the social worker which recommended that the claimant be placed in a residential inpatient care facility for alcohol and drug abuse, or that he undergo an intensive program of personal counselling. (16) The claimant refused these options. (17) When the claimant refused these various treatment options he was terminated for violation of the employer's rules as set out above.

CONCLUSION AND REASONS: We disagree with the referee and find that the claimant was discharged for misconduct in connnection with his work. The Administrative Rule cited by the referee sets out that misconduct is a wilful violation of the standards of behavior which an employer has the right to

expect of an employee and is an act that amounts to a wilful disregard of the employer's interests.

We find in the instant case that the claimant's actions constitute misconduct as defined above. He knew the employer's rules prohibited the use of drugs and alcohol and also recognized that he could be terminated if he violated those policies. Although the use of an illegal drug was optional during the religious ceremony, the claimant wilfully made the choice to ingest those drugs. He did so even after he was advised by others that such a choice would perhaps be incorrect or improper. Considering the seriousness of the claimant's conduct in violating the employer's rules we find the exculpatory provisions of the Rule cannot come into play.

DECISION: Referee Decision 83-E-2368 is set aside. Claimant is disqualified from benefits under ORS 657.176(2)(a).

Entered by the below named individuals constituting the Employment Appeals Board on January 27, 1984.

ROSS MORGAN, CHAIRMAN; Jerry E. Butler and Glenn E. Randall.

[certification omitted in printing]

APPENDIX E

IN THE SUPREME COURT OF THE STATE OF OREGON

SMITH,
Respondent on review,
v.
EMPLOYMENT DIVISION et al,
Petitioners on review.
(EAB 84-AB-1217; CA A33421; SC S32481)

On review from the Court of Appeals.*

Argued and submitted April 1, 1986.

James E. Mountain, Jr., Solicitor General, Salem, argued the cause for petitioner on review Employment Division. With him on the petition for review were Dave Frohnmayer, Attorney General, and Michael D. Reynolds and Jeff Bennett, Assistant Attorneys General, Salem.

Eldon F. Caley, Roseburg, waived oral argument for petitioner on review ADAPT.

David Morrison, of Heiling & Morrison, P.C., Roseburg, argued the cause for respondent on review.

Before Peterson, Chief Justice, and Lent, Linde, Campbell, Carson and Jones, Justices.

JONES, J.

The Court of Appeals is affirmed as modified; case remanded to the Employment Appeals Board for entry of an order not inconsistent with this opinion.

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* Judicial review from Employment Appeals Board, 75 Or App 764, 709 P2d 246 (1985).

JONES, J.

The issue in this case is whether the state Employment Division may deny unemployment benefits to claimant, Alfred L. Smith. Smith's employer, Douglas County Council on Alcohol and Drug Abuse Prevention and Treatment (ADAPT), discharged Smith because he ingested peyote while off duty during a ceremony of the Native American Church. The Employment Appeals Board concluded that Smith should not receive benefits because he had been discharged for misconduct connected with his employment. The Court of Appeals reversed, citing its decision in *Black v. Employment Division*, 75 Or App 735, 707 P2d 1274 (1986), and remanded to the Board for determination "whether this claimant's ingestion of peyote was a religious act." *Id.* at 743. We agree with the Court of Appeals, but we hold that remand to the Board for determination of the nature of claimant's ingestion of peyote is unnecessary.

Smith is a 66-year-old Klamath Indian and a member of the Native American Church. He had a drinking problem as a young man but has not used alcohol since 1957. Smith has counseled alcoholics since 1971, and worked for ADAPT from August 25, 1982, until his discharge March 5, 1984.

ADAPT views its counselors as role models for the persons they treat and therefore enforces a policy of abstinence from alcohol and mind-altering drugs. ADAPT's written personnel policy, in effect when Smith was hired, provides that "[m]isuse of alcohol and/or other mind-altering substances by a staff member" is grounds for termination. On September 19, 1983, ADAPT's executive director, John Gardin, warned Smith that he could be discharged for using peyote, even if the use was part of a religious ceremony. On October 3, 1983, ADAPT discharged Galen A. [sic] Black, another counselor and Native American Church member, because Black used peyote during a church ceremony. On December 5, 1983, ADAPT issued a memorandum concerning employe use of alcohol and other drugs, stating:

> "In keeping with our drug-free philosophy of treatment, and our belief in the disease concept of alcoholism, and the associated complex issues involved in both alcoholism and drug addiction, we require the following of our employees:
>
> 1. Use of an illegal drug or use of prescription drugs in a non-prescribed manner is grounds for immediate termination from employment. * * *"

On Friday, March 2, 1984, Gardin talked to Smith about Smith's planned attendance at a Native American Church service the upcoming weekend. Smith said that he intended to ingest peyote during the ceremony. Gardin replied that although he did not object to attendance, consumption of peyote would cause Smith's dismissal. Smith insisted that he would ingest peyote.

On Saturday, Smith participated in the ceremony and ingested a small quantity of peyote. On Monday, March 5, 1984, Smith told Gardin that he had indeed ingested peyote, and Gardin discharged Smith that day. Smith refused Gardin's offer to enter ADAPT's employe assistance program, saying that there was nothing wrong with him.

On March 22, the Employment Division denied unemployment benefits to Smith because he had been discharged for misconduct.[1] At Smith's requested hearing, the referee found that although Smith had committed misconduct, he was not disqualified from receiving benefits. The referee concluded that because "there is no evidence in the hearing record to indicate that granting benefits to claimants whose unemployment is caused by adherence to religious beliefs would have any significant impact on the trust fund, it cannot be held that the alleged State interest warrants interference with the claimant's freedom of religion." The Employment Appeals Board (Board) reversed. The Board stated that "[t]he compelling state interest is in the proscription of illegal drugs, not merely in the burden upon the Unemployment Compensation Trust Fund."

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[1] *See* ORS 657.176(2)(a) and OAR 471-30-038(3)), quoted *post* at pp 7-8.

I. OREGON CONSTITUTIONAL ANALYSIS

In this case, claimant contends that the denial of unemployment benefits placed a burden on his freedom to worship according to the dictates of his conscience under the Oregon Constitution, Article I, sections 2 and 3. Those sections provide:

> "Section 2. Freedom of worship. All men shall be secure in the Natural right, to worship Almighty God according to the dictates of their own consciences.
>
> Section 3. Freedom of religious opinion. No law shall in any case whatever control the free exercise, and enjoyment of religeous (sic) opinions, or interfere with the rights of conscience."

Claimant also relies upon the First Amendment to the federal constitution, but we address the Oregon constitutional issues first. In a recent decision concerning a religious school's right to be exempt from paying unemployment taxes, we stated that "the judicial responsibility [is] to determine the state's own law before deciding whether the state falls short of federal constitutional standards." *Salem College & Academy, Inc. v. Emp. Div.*, 298 Or 471, 484, 695 P2d 25 (1985). We follow this practice consistently, *See, e.g., State v. Atkinson*, 298 Or 1, 688 P2d 832 (1984); *State v. Kennedy*, 295 Or 260, 666 P2d 1316 (1983). We now examine the Oregon constitutional issues.

The states were the original guarantors of religious freedom for their citizens. In *Permoli v. First Municipality of New Orleans*, 44 US (3 How) 589, 610, 11 L Ed 739 (1845), the United States Supreme Court held that the federal constitution did not protect the religious liberties of state citizens from encroachment by state legislatures. *See* Cooley, Constitutional Limitations 587 (4th ed 1878). Not until 1940 did the Court apply the free exercise clause of the First Amendment to the states through the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 US 296, 60 S Ct 900, 84 L Ed 1213 (1940) (statute regulating religious solicitation that allowed officials discretion to determine whether solicitation was religious held invalid).

In a line of decisions starting with *City of Portland v. Thornton*, 174 Or 508, 512-13, 149 P2d 972 (1944), *cert den* 323 US 770 (1945), this court interpreted the Oregon guarantees of religious freedom as "identical in meaning" to the federal constitution. *See Baer v. City of Bend*, 206 Or 221, 223, 292 P2d 134 (1956); *Jehovah's Witnesses v. Mullen*, 214 Or 281, 291, 330 P2d 5 (1958), *appeal dismissed* 359 US 436 (1959). However, in *Salem College & Academy*, which also arose under the unemployment compensation law, we interpreted the Oregon Constitution, Article I, sections 2 and 3, independently of the federal constitution. That analysis is relevant to our disposition of this case.

In *Salem College & Academy*, a religious school contended that the state could not compel it to pay unemployment taxes because to do so would infringe upon the school's free exercise rights under the Oregon Constitution. We rejected that contention, holding that the state had not infringed upon the school's right to religious freedom when all similarly situated employers in the state were subject to the same tax. We stated:

> "The exaction [of unemployment tax] here is in no way based on activities or resources that are more characteristic of schools than of other kinds of employers or institutions, let alone on a school's religious character or the content of its programs. The obligation to provide unemployment coverage focuses solely

> on the economic and social aspect of the employment relation and the cost that unemployment imposes on the discharged employee and on society. * * * These payments are financial burdens only in the same sense that the costs of employing paid workers at all are financial burdens; a religious association engaged in the free exercise of worship or other religious activity without employing paid personnel pays no unemployment tax.
>
> "As to the alleged administrative and clerical burdens, such as posting notices, filing reports and keeping payroll records subject to inspection by the Employment Division, these requirements, too, are tailored to the economic aspect of the employment relation and not to any activities peculiarly characteristic either of schools or of religious programs. They are not different in principle from a host of other secular regulatory requirements such as health inspections of cafeteria workers or kitchens, safety inspection of school busses, and licensing of drivers." 298 Or at 486-87.

The unemployment compensation law disqualifies claimants who have been discharged for what an employer validly considers misconduct connected with the employment. ORS 657.176(2)(a). Just as employers may be required to pay unemployment taxes regardless of their religious affiliations, employes discharged for misconduct may be denied unemployment benefits regardless of their motivation for committing the misconduct. All discharged employes in this state are subject to the same standards, and the definition of misconduct does not speak at all to religious motivations for the misconduct. In this case, the claimant wilfully violated the employer's orders, which ORS 657.176(2)(a) and OAR 471-30-038(3) define as misconduct. ORS 657.176(2)(a) provides:

> "An individual shall be disqualified from the receipt of benefits until the individual has performed service in employment subject to this chapter, or for an employing unit in this or any other state or Canada or

> as an employe of the Federal Government, for which remuneration is received which equals or exceeds four times the individual's weekly benefit amount subsequent to the week in which the act causing the disqualification occurred, if the authorized representative designated by the assistant director finds that the individual:
>
> (a) Has been discharged for misconduct connected with work * * *."

OAR 471-30-038(3) provides:

> "Under the provisions of ORS 657.176(2)(a) and (b), misconduct is a wilful violation of the standards of behavior which an employer has the right to expect of an employe. An act that amounts to a wilful disregard of an employer's interest, or recurring negligence which demonstrates wrongful intent is misconduct. Isolated instances of poor judgment, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere ineffeciency resulting from lack of job skills or experience are not misconduct for purposes of denying benefits under ORS 657.176."

The statute and the rule are completely neutral toward religious motivations for misconduct. If the statute or the rule did discriminate for or against claimants who were discharged for worshipping as they chose, we would be faced with an entirely different issue.

The referee and the Board agreed that the employe was discharged for misconduct, although they disagreed on the consequences of the misconduct. Claimant does not argue here that ADAPT had no right to fire him; this is not a wrongful discharge claim. Claimant states in his brief that "[t]his proceeding does not challenge the employer's decision to fire Al Smith, only the state's denial of unemployment benefits." Instead, claimant argues, denial of unemployment benefits burdens, albeit indirectly, his right to worship as he see fit. An employer may impose conditions on employment that conflict with the employe's particular religious practices or beliefs. If the employe violates the conditions imposed, the employe is not eligible for benefits when the violation is "a wilful violation of the standards of behavior which an employer has the right to expect of an employe." OAR 471-30-038(3). Claimant was denied benefits through the operation of a statute that is neutral both on its face and as applied. The law and the rule defining misconduct in no way discriminate against claimant's religious practices or beliefs. If claimant's freedom to worship has been interfered with, that interference was committed by his employer, not by the unemployment statutes.

Under the Oregon Constitution's freedom of religion provisions, claimant has not shown that his right to worship according to the dictates of his conscience has been infringed upon by the denial of unemployment benefits. We do not imply that a governmental rule or policy disqualifying a person from employment or from public services or benefits by reason of conduct that rests on a religious belief or a religious practice could not impinge on the religious freedom guaranteed by Article I, sections 2 and 3. Nor do we revive a distinction between constitutional "rights" and "privileges." But here it was not the government that disqualified claimant from his job for ingesting peyote. And the rule denying unemployment benefits to one who loses his job for what an employer permissibly considers misconduct, conduct imcompatible with doing the job, is itself a neutral rule, as we have said. As long as disqualification by reason of the religiously based conduct is peculiar to the particular employment and most other jobs remain open to the worker, we do not believe that the state is denying the worker a vital necessity in applying the "misconduct" exception of the unemployment compensation law. However, our inquiry must not end here. We now consider whether claimant should receive unemployment benefits under the free exercise clause of the federal First Amendment.

II. FEDERAL CONSTITUTIONAL ANALYSIS

Although we conclude that the state constitution has not been violated by the denial of benefits to claimant, we find that he is entitled to prevail under the federal First Amendment. The First Amendment provides in relevant part that "Congress shall make no law respecting an establishment of religion or prohibit the free exercise thereof * * *." In applying the free exercise clause of the First Amendment, the United States Supreme Court employs a balancing test that protects religiously motivated actions as well as religious beliefs. The Court's balancing test first requires that the person claiming the free exercise right show that the application of the law in question significantly burdens the free exercise of his religion. If the person shows this burden, the state then must demonstrate that the constraint on the religious activity is the least restrictive means of achieving a "compelling" state interest. *Sherbert v. Verner*, 374 US 398, 83 S Ct 1790, 10 L Ed 2d 965 (1963); *see* Nowak, Rotunda, & Young, Constitutional Law 1053-54 (2d ed 1983).

In *Sherbert*, the Court applied this balancing test in concluding that South Carolina could not withhold unemployment benefits from a woman whose religion forbade working on Saturday. The claimant, a Seventh-Day Adventist, was discharged because she would not work on Saturdays, and she then could not find another job because of her refusal to work Saturdays. The state denied unemployment benefits because the claimant did not have a legitimate cause for failing to find work.

The Court held that the denial of unemployment benefits forced the claimant

> "to choose between following the precepts of her religion and forfeiting her benefits, on the one hand,

> and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against [her] for her Saturday worship." 374 US at 404.

South Carolina in effect penalized the claimant for refusing to violate her religious beliefs. After concluding that the claimant suffered a substantial, though indirect, burden on her free exercise rights, the Court found that the state had not shown a compelling secular interest that justified the burden. The Court held that South Carolina must exempt workers such as the claimant from its requirement that they be available for work on Saturdays.

The Court reaffirmed *Sherbert* in *Thomas v. Review Bd.*, 450 US 707, 101 S Ct 1425, 67 L Ed 2d 624 (1981). The Court held that a Jehovah's Witness who quit his job when he was transferred to a department that manufactured munitions was entitled to unemployment benefits, even though his religion did not absolutely forbid him to work in munitions manufacturing. As in *Sherbert*, the Court held that the state had not demonstrated a compelling interest that justified denying the claimant benefits.

We hold that under these decisions, the referee correctly concluded that Smith should receive unemployment benefits.

The denial of unemployment benefits significantly burdened Smith's free exercise rights. The employer does not question the sincerity of Smith's religious beliefs. The Board's findings demonstrate that peyote is the sacrament of the Native American Church.

The fact that some Church members may not ingest peyote is irrelevant to our inquiry. In *Thomas*, the Court held "the guarantee of free exercise is not limited to beliefs which are shared by all the members of a religious sect." 450 US at 715-16. We are not to examine the tenets of a religion once

the sincerity of the claimant's belief has been demonstrated, because to do so would improperly involve the courts in theological disputes. *See id.* at 716 ("Courts are not arbiters of scriptural interpretation").

The next step in the analysis is determining whether the state action burdens the claimant's religious expression significantly or only minimally. Under *Sherbert* and *Thomas*, we are constrained to hold that the denial of unemployment benefits is a significant burden on Smith's religious freedom. "While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial." *Thomas*, 450 US at 718.

Nor is the state's interest in this case a more "overriding" or "compelling" interest than in *Sherbert* and *Thomas*. The Board found that the state's interest in proscribing the use of dangerous drugs was the compelling interest that justified denying the claimant unemployment benefits. However, the legality of ingesting peyote does not affect our analysis of the state's interest. The state's interest in denying unemployment benefits to a claimant discharged for religiously motivated misconduct must be found in the unemployment compensation statutes, not in the criminal statutes proscribing the use of peyote.[2] The Employment Division concedes that

---

[2] Under ORS 475.992(4) and OAR 855-80-020, the possession of peyote is a crime. Peyote (*Lophophora williamsii*) is a cactus that "contains a number of active alkaloids with varying properties; the chief hallucinogen among these alkaloids is mescaline." Note, *Hallucinogens*, 68 Colum L Rev 521, 525 (1968). The Oregon Court of Appeals, construing a previous statute, has held that religious users of peyote are not exempt from criminal sanctions. *State v. Soto*, 21 Or App 794, 537 P2d 142 (1975), *cert den* 424 US 955 (1976). The federal government and several states exempt the religious use of peyote through caselaw, statute or regulation. *See State v. Whittingham*, 19 Ariz App 27, 504 P2d 950 (1973), *cert den* 417 US 946 (1974); *People v. Woody*, 61 Cal 2d 716, 40 Cal Rptr 69, 394 P2d 813 (1964); *Whitehorn v. State*, 561 P2d 539 (Okla Crim App 1977); 21 CFR § 1307.31 (1985); Iowa Code Ann § 204.204(8) (1986); NM Stat Ann § 30-31-6(D) (1980); SD Comp Laws Ann § 34-20B-14(17) (1977); Tex Stat Ann 4476-15 § 4.11 (1976).

"the commission of an illegal act is not, in and of itself, grounds for disqualification from unemployment benefits. ORS 657.176(3) permits disqualification only if a claimant commits a felony in connection with work * * *. [T]he legality of [claimant's] ingestion of peyote has little direct bearing on this case."[3]

The state's interest is simply the financial interest in the payment of benefits from the unemployment insurance fund to this claimant and other claimants similarly situated. *Sherbert* and *Thomas* did not find this financial interest "compelling" when weighed against the free exercise rights of the claimant. The state has not shown that the financial stability of the fund will be imperiled by claimants applying for religious exemptions if this claimant receives benefits. The Division also argues that granting Smith unemployment benefits will violate the establishment clause of the First Amendment. In light of the holdings of *Thomas* and *Sherbert*, which are directly in point, we reject the Division's argument.

Therefore, under the federal test, Smith is entitled to receive unemployment benefits. Although the Court of Appeals remanded this case and *Black v. Employment Division, supra*, to the Board for determination of the claimant's religious interest, we see no reason to remand for a determination of claimant's religious interest in ingesting peyote. The Court of Appeals is affirmed as modified and the case is remanded to the Board for entry of an order not inconsistent with this opinion.

---

[3] ORS 657.176(3) provides:

> "If the authorized representative designated by the assistant director finds an individual was discharged for misconduct because of the individual's commission of a felony or theft in connection with the individual's work, all benefit rights based on wages carried prior to the date of the discharge shall be canceled if the individual's employer notifies the assistant director of the discharge * * * and:
>
> (a) The *individual has admitted commission of the felony* or theft to an authorized representative of the assistant director, or
>
> (b) The *individual has signed a written admission of such act* and such written admission has been presented to an authorized representative of the assistant director, or
>
> (c) Such act has resulted in a *conviction by a court of competent jurisdiction.* (Emphasis added.)

This statute does not apply to claimant herein.

OPPOSITION
BRIEF

86-947

Supreme Court, U.S.
FILED
JAN 5 1987
JOSEPH F. SPANIOL, JR.

No. 86-_____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

EMPLOYMENT DIVISION,
DEPARTMENT OF HUMAN RESOURCES
of the STATE OF OREGON,
RAY THORNE, Administrator, and ADAPT,

Petitioners,

v.

GALEN W. BLACK,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of the State of Oregon

RESPONDENT'S BRIEF IN OPPOSITION

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December, 1986

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QUESTION PRESENTED

Whether a Native American Church member, who was discharged from his employment as a drug and alcohol rehabilitation counselor because his sacramental use of peyote in a bona fide Native American Church ceremony conflicted with the employer's total drug and alcohol abstinence treatment philosophy, is entitled to unemployment compensation under the Free Exercise Clause?

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SUPPLEMENTAL STATUTES AND REGULATIONS INVOLVED

The American Indian Religious Freedom Act of 1978, 42 U.S.C. § 1996, provides:

> Henceforth it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

Pursuant to 21 C.F.R. § 1307.31:

> **Native American Church**
> The listing of peyote as a controlled substance in Schedule I does not apply to the nondrug use of peyote in bona fide religious ceremonies of the Native American Church, and members of the Native American Church so using peyote are exempt from registration. Any person who manufactures peyote for or distributes peyote to the Native American Church, however, is required to obtain registration annually and to comply with all other requirements of law.

SUPPLEMENT TO PETITIONER'S STATEMENT OF THE CASE

Petitioner's Statement of the Case contains no factual inaccuracies material to this Court's determination relative to allowance or denial of certiorari, but fails to mention the legal status of peyote was not a factor in the employer's decision to discharge claiment. The consumption of wine as a sacrament by a member of the Catholic faith is equally repugnant to the employer's total abstinence treatment philosophy. (Rec. at 27.) Respondent admits taking peyote as part of a church ceremony but denies his ingestion of the same was illegal. (Rec. at 30, 33, 36.)

REASONS FOR DENYING THE WRIT

I. The Federal Question Raised by Petitioner Has Been Clearly Settled by This Court

As grounds for review the state submits this Court's analysis of First Amendment free religious exercise claims is inconsistent and suggests the decisions in *Sherbert v. Verner,* 374 U.S. 398 (1963), and *Thomas v. Review Bd. of Indiana Employment Security Div.,* 450 U.S. 707 (1981), be overruled in light of the result in the case at bar.

The cases relied upon by petitioner, however, illustrate a refinement of First Amendment principles rather than the reverse. Assuming the "balancing or 'compelling state interest' analysis" is incomplete, as petitioner complains, review of this case would not further illuminate the issue the state finds so confusing, to wit: "how to measure the burden on a claimant's religion and how to assess the state's interest." (Petition at 9.)

In that regard, this Court held in *Sherbert* and reaffirmed in *Thomas* that the loss of unemployment benefit eligibility as cost of adherence to religious beliefs imposed a substantial burden on a worker's constitutional rights of free exercise which was not outweighed by the state's interest in protecting the unemployment insurance fund from undue depletion. Thus, the application of religious freedom principles in the context of an unemployment compensation case is perfectly clear. As petitioner aptly observes, the law on this particular issue is so clear it may be characterized as a "*per se* rule." (Petition at 9.)

Petitioner's true objection is not that the controlling cases from this court lack clarity but, rather, that unemployment compensation may not be withheld as a civil penalty for criminal conduct. The state is without standing, however, to here assert any interest in enforcement of the state criminal code since the statute being challenged as overreaching is the unemployment compensation law, not the Oregon Uniform Controlled Substances Act.

Regardless, the facts the state finds so troubling in this case are unlikely to recur. Under Oregon law, and in all other states, misconduct is not grounds for benefit disqualification unless it is found to be connected with work. *See* Or. Rev. Stat. 657.176(2) (1985). Here, the employer's total abstinence substance abuse treatment philosophy provides the only link between respondent's off-duty religious practices and his employment. Absent that unusual connection, his ingestion of peyote would not subject him to benefit disqualification.

Thus, while the outcome of this case is of profound significance to respondent, it cannot be deemed to raise an important question of federal law requiring decision by this Court.

II. The Decision of the Oregon Supreme Court is Consistent With Applicable Decisions of This Court

Petitioner urges the illegality (in Oregon) of respondent's religious conduct materially distinguishes this case from *Sherbert* and *Thomas* and compels a contrary result. That issue was fully briefed in the courts below, and correctly found to be without merit.

A fatal flaw in the state's argument is that it assumes the constitutionality of proscribing the nondrug use of peyote in a bona fide Native American Church ceremony, a disputed issue which cannot be litigated other than in the context of a criminal prosecution.

In passing legislation to curb drug abuse, it was never the intention of the U. S. Congress to interfere with Native

American Church members' practice of their religion. In fact, an express provision to that effect was included in the House version of the Drug Abuse Control Amendments of 1965, the precursor of the Federal Controlled Substances Act of 1970. Concern about deletion of that provision from the final version was allayed by a letter from the Commissioner of Food and Drugs which read, in pertinent part:

> If the church is a bona fide religious organization that makes sacramental use of peyote, then it would be our view that H.R. 2, even without the peyote exemption which appeared in the House-passed version, could not forbid bona fide religious use of peyote. *We believe that the constitutional guarantee of religious freedom fully safeguards the rights of the organization and its communicants.*

Emphasis added. 111 Congressional Record 15977 (1965). That constitutional guarantee is now specifically protected under federal law. (*See* 21 C.F.R. § 1307.31.)

The belief that sacramental use of peyote may not be proscribed consistently with First Amendment free exercise principles is now the law in a number of states. Petition at App-37, fn. 2. Indeed, as noted by the Oregon Court of Appeals in *Black v. Employment Division,* 75 Or. App. 735 at 744 fn. 8, 707 P.2d 1274 (1985), the criminal case relied upon by the petitioner as prima facie evidence of the illegality of respondent's religious use of peyote[1] has become "a distinct exception to the current trend in western states with significant Indian populations."

That the holding in *Soto, supra,* has not been challenged in the ten years intervening despite subsequent promulgation of the federal regulatory exemption and enactment of the American Indian Religious Freedom Act of 1978, 42 U.S.C. § 1996, suggests the law likely has not since been applied to proscribe the sacramental use of peyote by Native American Church members in Oregon and thus, in practice, is no longer the law. As this Court observed in *Poe v. Ullman,* 367 U.S. 497, 502 (1961): "'Deeply embedded traditional ways of carrying out state policy . . .' - or not carrying it out - 'are often tougher and truer law than the dead words of the written text.'"

It appears petitioner is attempting to use the case at bar to reaffirm the vitality of *Soto* and thus short circuit due process. That may not be done. The state court properly applied controlling decisions of this Court, and reached the correct result.

If the legality of religious conduct could be deemed a consideration material to the court's determination of an individual's eligibility for unemployment benefits, selection of this case to set the standard would cloud rather than clarify the free religious exercise guarantees of the constitution. Respondent was never charged with a criminal offense and his religious conduct is exempt from criminal sanctions under federal law. He cannot be deemed "guilty" and penalized by a federal court when the courts in the state that purports to make practice of his religion a crime have declined to impose penalty.

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[1] *State v. Soto,* 21 Or. App. 794, 537 P.2d 142, S.Ct. *rev. den.* (1975), *cert. den.* 424 U.S. 995 (1976).

CONCLUSION

The guidance provided by *Sherbert* and *Thomas* is clear. As the Oregon Courts properly decided, the state cannot challenge the legality of respondent's religious practices by means of Employment Division law. The Petition for a Writ of Certiorari should therefore be denied, or the order below summarily affirmed on the merits pursuant to U.S. Supreme Court Rule 23.1.

Respectfully submitted,

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JOINT
APPENDIX

Supreme Court, U.S.
FILED
AUG 14 1987
JOSEPH F. SPANIOL, JR
CLERK

No. 86-946 ①
No. 86-947 ②

In the Supreme Court of the United States

OCTOBER TERM, 1986

EMPLOYMENT DIVISION
DEPARTMENT OF HUMAN RESOURCES,
of the STATE OF OREGON,
RAY THORNE, Administrator,
Petitioners,

v.

ALFRED SMITH (No. 86-946)
and GALEN W. BLACK (No. 86-947),
Respondents.

On Writ of Certiorari to the
Supreme Court of the State of Oregon

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED DEC. 2, 1986
CERTIORARI GRANTED MARCH 9, 1987

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The following opinions, orders and decisions regarding *Employment Division v. Black* have been omitted in printing this appendix, because they appear on the following pages of the printed petition for certiorari:

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Oregon Supreme Court order denying reconsideration, dated Sept. 3, 1986 .... App-9

Oregon Court of Appeals opinion, dated Oct. 16, 1985 .... App-11

Employment Appeals Board decision, dated Jan. 27, 1984 .... App-23

The following opinions, orders and decisions regarding *Employment Division v. Smith* have been omitted in printing this appendix, because they appear on the following pages of the printed petition for certiorari:

Oregon Supreme Court opinion, dated June 24, 1986 ...... App-1

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Employment Division v. Black

Nov. 4, 1983—Administrative decision denying unemployment benefits.

Nov. 8, 1983—Claimant Black's request for hearing.

Dec. 8, 1983—Referee decision setting aside administrative decision.

Dec. 20, 1983—Employer ADAPT's application for review to the Oregon Employment Appeals Board.

Feb. 3, 1984—Employment Appeals Board decision setting aside referee decision and disqualifying claimant from receipt of benefits.

Oct. 16, 1985—Opinion of the Oregon Court of Appeals reversing and remanding the decision of the Employment Appeals Board.

June 24, 1986—Opinion of the Oregon Supreme Court affirming the Court of Appeals.

Dec. 2, 1986—Employment Division's Petition for Writ of Certiorari filed.*

Mar. 9, 1987—Certiorari granted.

Employment Division v. Smith

Mar. 22, 1984—Administrative decision denying unemployment benefits.

Mar. 26 1984—Claimant Smith's request for hearing.

July 23, 1984—Referee decision modifying administrative decision.

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* ADAPT was incorrectly listed as a petitioner on the cover of petitioners' petitions for writ of certiorari and on the cover of petitioners' consolidated opening brief on the merits. The petitioners in these cases correctly are identified on page one of their respective petitions for writ of certiorari as the Employment Division, Department of Human Resources of the State of Oregon, and Ray Thorne, administrator.

July 24, 1984—Employer ADAPT's application for review to the Oregon Employment Appeals Board.

Aug. 28, 1984—Employment Appeals Board decision modifying referee decision and disqualifying claimant from receipt of benefits.

Oct. 16, 1985—Opinion of the Oregon Court of Appeals reversing and remanding the decision of the Employment Appeals Board.

June 24, 1986—Opinion of the Oregon Supreme Court affirming the Court of Appeals.

Dec. 2, 1986—Employment Division's Petition for Writ of Certiorari filed.*

Mar. 9, 1987—Certiorari granted.

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BLACK RECORD ITEM 4

REFEREE DECISION

[letterhead omitted in printing]

Decision Mailed: December 8, 1983
Decision Final: December 28, 1983
Case No.: 83-E-2368
SSA No.: 514 50 6337
(41-4)

CLAIMANT	EMPLOYER
Galen W. Black	ADAPT
1185 N.W. Hicks #2	PO Box 1121
Roseburg, OR 97470	Roseburg, OR 97470

An authorized representative served an administrative decision November 4, 1983 disqualifying claimant from benefits under ORS 657.176. Claimant filed a request for hearing November 8, 1983.

A hearing was held in Roseburg, Oregon December 5, 1983. Present were: claimant and J. Gardin representing the employer.

ISSUE AND LAW: Is the claimant subject to disqualification from benefits because of separation from work with above employer? (See ORS 657.176(2); OAR 471-30-038.)

FINDINGS OF FACT: (1) The employer is a non-profit organization engaged in operating programs for the treatment and prevention of alcohol and drug abuse. (2) Claimant is recovering from alcohol and drug addiction. (3) Claimant was employed in various capacities by the employer from September 12, 1982 through October 3, 1983. (4) From June 15, 1983 through October 3, 1983 the claimant was a drug and alcoholism rehabilitation counselor for the employer. (5) The employer's policies specifies [*sic*] that misuse or abuse of drugs or alcohol by an employe may result in discharge. (6) On September 10, 1983 the claimant attended a native American religious ceremony and took a small amount of the drug peyote as part of the ceremony ritual. (7) The claimant did not take a sufficient amount of peyote to produce any hallucinogenic or narcotic symptoms. (8) The claimant was not working at the time he took the peyote and was not scheduled to report for work until September 12, 1983. (9) On September 16, 1983 the claimant's supervisor, who had learned of the claimant's participation in the September 10 ceremony, confronted the claimant and the claimant admitted taking a small amount of peyote. (10) Peyote is an illegal drug. (11). As a result of the claimant's admission that he had taken a drug, the claimant was asked to submit to an evaluation by a professional social worker. (12) The claimant was placed on indefinite mandatory sick leave and vacation beginning September 19 and did not work after that date. (13) On or about October 3, 1983 the employer received an evaluation from the social worker which recommended that the claimant be placed in a residential in-patient care facility for alcohol and drug abuse treatment or that he undergo a program of intensive personal counseling. (14) On October 3 the employer told the claimant that in order to continue employment the claimant would have to spend some time in a residential treatment center outside the Roseburg area to obtain counseling for a relapse of his alcoholism and or drug addiction. (15) The claimant refused to participate in a residential rehabilitation program and was discharged on October 3, 1983. (16) Claimant would not have been paid for the time spent in the rehabilitation program and would have been responsible for paying any cost of the program which was not covered by the employer's health

[5]

insurance. (17) Other than the use of peyote on September 10, 1983 the claimant has not used drugs or alcohol since early 1972. (See Exhibit 3).

CONCLUSION: Claimant was discharged, but not for misconduct in connection with his employment.

OAR 471-30-038(3) states in part that "misconduct is a wilful violation of the standards of behavior which an employer has the right to expect of an employe. An act that amounts to a wilful disregard of an employer's interests, or recurring negligence which demonstrates wrongful intent is misconduct." The rule also provides that "isolated instances of poor judgment, good faith errors. . .absences due to illness. . .or mere inefficiency resulting from lack of job skills or experience are not misconduct. . .".

Although the claimant was given the opportunity to save his position by undergoing treatment, the referee finds that the claimant was not obligated to do so and his refusal does not alter the nature or the reason for the separation. The claimant was discharged because he injected peyote on September 10, 1983. While the referee agrees that the claimant's use of peyote was cause for great concern by the employer, that action was nonetheless an isolated instance of poor judgment. Such incidents do not constitute misconduct under the rule set forth above.

DECISION: The administrative decision served November 4, 1983 is set aside. The claimant is not subject to disqualification from benefits under ORS 657.176(2)(a).

[signature omitted in printing]

EXHIBIT 2: PERSONNEL POLICY
[excerpts]

DOUGLAS COUNTY COUNCIL ON
ALCOHOL & DRUG ABUSE
PREVENTION & TREATMENT
PERSONNEL POLICY
SEPTEMBER, 1981

. . . .

III. *Recruitment*:

. . . .

D. Equal Opportunity for Employment

1. Race, color, national origin, creed, sex, religion, marital status, political affiliation, age, basis of handicap and any and all other factors not pertinent to job performance will not be considered in hiring, promotion, salary or other terms and conditions of employment. ADAPT subscribes to all policies and goals of the Civil Rights Act of 1964, as amended.

. . . .

V. *Professional Integrity*:

A. Agreement: In keeping with the avowed goals and purposes of D.C.C.A., and as a means of assuring exemplary counselor-client relationships, all employees hereby agree to:

1. Conduct themselves in a manner designed to assure the confidentiality of all records, materials and communications concerning the identity of clients and their families.
2. Demonstrate an ability to work under supervision and to cooperate with other personnel, and an ability to function competently and effectively on one's own.

3. Refrain during all working hours and work-related hours from the use of any and all alcoholic beverages and/or other mind-altering substances unless proscribed by a physician. Work-related hours include pre-working hours, lunch periods and on call time.
4. Assume the responsibility for self-evaluation and continued professional growth through further education and training.
5. Maintain an ability to assess one's own personal and professional strengths and limitations to the end that each client's best interests are served through appropriate referrals to other individuals and programs.
6. Demonstrate respect for the client's personal life outside of the professional relationship.
7. Demonstrate respect for the rights and reputations of other alcoholism staff and other professionals.
8. Refrain from discrimination among clients and/or colleagues on the basis of race, color, creed, age, religion or sex.
9. Demonstrate exemplary behavior in order to enhance work with clients. This includes, invariably, the avoidance of all substance abuse.
10. All staff will attire themselves in a professional manner.
11. Staff and client are to maintain a professional relationship only.

VI. *Suspension With Notice*: It shall be within the sole discretion of the Executive Director to suspend with notice at the time of suspension any staff member who misuses alcoholic beverages and/or other mind-altering drugs.

. . . .

X. *Termination and Grievance Procedures*:

A. Notice Requirements: All staff members who resign from the agency will be expected to give a notice in writing:

1. Program and supervisory staff are required to give 30 days notice.
2. Secretarial and support staff are required to give 15 days notice.
3. It shall be expected that staff will completed [*sic*] all unfinished work before termination.

B. Termination Procedures:

1. The Executive Director may, with counsel from the Personnel Committee, terminate for any of the following causes:
   - a. Neglect of duty
   - b. Inefficiency
   - c. Incompetency
   - d. Insubordination
   - e. Conviction of a crime involving moral turpitude
   - f. Misuse of alcohol and/or other mind-altering substances by a staff member.
2. The specified charges for dismissal shall be furnished to the employee by the Executive Director and a copy filed with the Chairman of the Personnel Committee.

C. Appeal Procedures: Any permanent employee who is dismissed may appeal such action to the Personnel Committee. The appeal must be filed in writing at the office of the Executive Director within five working days of notice of the action being appealed. The Executive Director shall forward the written notice of appeal to the Chairperson of the Personnel Committee and shall aide [*sic*] in arranging an appeal hearing as soon as possible. The appear [*sic*] hearing shall be conducted by the Personnel Committee within 30 calendar days after receipt of the appeal by the Executive Director. If satisfaction is not derived, written appeal may be made by the employee to the Board of Directors within (5) calendar days of said action by the Personnel Committee. Said appeal should be filed with the Executive Director who shall notify the Chairman of the Board of Directors. An appeal hearing shall be conducted by the Board of Directors within 30 days of receipt of appeal. The Executive Director may, upon the termination of any employee, request a hearing before the Personnel Committee in order to clarify said termination.

D. Executive Director: Dismissal

1. The Board of Directors may dismiss an Executive Director for any of the following causes:
   - a. Neglect of duty
   - b. Inefficiency
   - c. Incompetency
   - d. Insubordination
   - e. Conviction of a crime involving moral turpitude
   - f. Misuse of alcohol and/or other mind-altering substances.

All the above terms and conditions of employment are hereby agreed to by the Douglas County Council on Alcohol & Drug Abuse Prevention & Treatment, as employer, and the undersigned staff member, as employee, and represent the entire agreement as contemplated by the parties thereto at the time of the signing of this instrument. The parties hereto agree that the laws of the State of Oregon apply to all of the terms and conditions herein and any subsequent interpretation thereof.

In witness whereof, the parties have set their hands this 13th day of September, 1982.

/s/ John Gardin II
Executive Director
Douglas County Council on Alcohol & Drug Abuse
Prevention & Treatment

/s/ Galen W. Black
Employee

9-13-82
Date of Employment

SMITH RECORD
EXHIBIT 2: POLICY STATEMENT

POLICY STATEMENT
ALCOHOL AND OTHER DRUG USE BY EMPLOYEES

In keeping with our drug-free philosophy of treatment, and our belief in the disease concept of alcoholism, and associated complex issues involved in both alcoholism and drug addiction, we require the following of our employees:

1. Use of an illegal drug or use of prescription drugs in a non-prescribed manner is grounds for immediate termination from employment.
2. Misuse of alcohol by non-recovering staff will not be tolerated, and is grounds for disciplinary action, up to and including immediate termination. Misuse shall be defined as being observed to be visibly intoxicated (e.g., staggering, slurred speech, unacceptable social behavior, or, consuming enough alcohol to give a BAL of .08, or being charged with or arrested for any alcohol related offenses). All reports of misuse by staff will be investigated as to accuracy prior to any action being taken.
3. Any use of alcohol by recovering staff will not be allowed, and is grounds for immediate disciplinary action, up to and including termination. Use shall be defined as any ingestion of an alcoholic beverage, in *any* situation.
4. Any staff person who commits an infraction of the above policies is eligible for referral to our employee assistance program, as appropriate.
5. As a result of an employee's participation in the employee assistance program, a determination will be made that the employee is in need of treatment for an alcohol and/or other drug abuse problem, the following applies:
   a. Provided the employee is willing to accept treatment, he/she will be required to take leave from work for the

entire length of the treatment period. The employee may elect to use accumulated sick leave and vacation leave for this purpose. However, when such leave is exhausted, the employee will be required to take leave without pay.

b. If an employee accepts a leave without pay, it will be for a minimum of six months from the date of use. The employee will be evaluated at that time to determine ability to resume duties. If determined to be able to return to the former position at that time, the employee will be placed on a 12 month probationary period. If determined unable to return to the position at that time, the employee will continue on leave without pay for an additional six months, at which time the employee will be re-evaluated. If determined able to return to the former position, the employee will resume his/her duties on a 12 month probationary period. If determined unable to resume the duties, the employee will be terminated.

SMITH RECORD EXHIBIT 7: AFFIDAVITS

AFFIDAVIT OF TERENCE T. GORSKI

STATE OF ILLINOIS)
) ss.
County of Cook)

I, Terence T. Gorski, being duly sworn, depose and say:

I am the President of the CENAPS Corporation, which specializes in research, development and clinical training for alcoholism and drug abuse counsellors. The CENAPS Corporation's method of relapse prevention is used in well over 200 treatment programs throughout the United States and Canada.

I have personally trained over 8000 people over the last five years in relapse prevention and related skills. I have been specializing for fifteen years in the training of staff concerning relapse and the treatment of relapse.

I am the author of *Counselling for Relapse Prevention: Learning to Live Again - A Guide to Recovery from Alcoholism*; and numerous other publications on alcoholism and drug abuse, as indicated in the attached resume.

I have an M.A. in Human Relations from Webster College in St. Louis, Missouri, and a bachelor's degree in Psychology and Sociology from Northeastern llinois University. I am a Senior Certified Alcoholism Counsellor in the State of Illinois, and a former medallist for the Marty Mann Award, an award for excellence in communication in the field of alcoholism.

Relapse consists of any episode of incapacitation or dysfunction that results from the use of alcohol or drugs or the improper management of a recovery program.

The following criteria can be useful in determining whether a person recovering from alcoholism or drug dependence has experienced a relapse episode:

Definition of Relapse Episode: A relapse episode consists of any episode of incapacitation or dysfunction that occurs during sobriety in the treated alcoholic that stems directly from the use of alcohol or other drugs or from the mismanagement of the recovery program.

Specific Criteria:

1. *Previous Successful Treatment For Alcoholism or Drug Dependence*: The person has successfully completed a treatment process (professional treatment program, Alcoholics Anonymous, or other self help program) which has resulted in the following outcomes:

A. Recognition that s/he is suffering from Alcoholism or Drug Dependence.

B. Recognition that s/he needs to maintain total abstinence from alcohol and mood altering drugs in order to maintain abstinence and improve health and life style functioning.

C. Recognition that a formal structured recovery program is necessay to maintain abstinence and to improve long term health and life style functioning.

2. *High Functional Level*: The person has maintained a high level of functioning measured by the absence of psychological, health, social, or occupational problems.

3. *Alcohol or Drug Use*: The person has abstained from the use of alcohol and all mood altering chemicals or the use of such chemicals corresponds with the following criteria:

A. *Medical Use*: At times necessary medical treatment involves the use of mood altering drugs as a necessary part of that treatment. Such use can constitute a high relapse risk, but the use itself does not necessarily constitute a relapse. The following criteria should be used to determine if medically prescribed use has induced a state of relapse:

(1) The use occurs under appropriate medical supervision and is deemed necessary for the treatment of an illness or condition.

(2) The use is limited to the strictly defined medical purpose, does not exceed prescribed doses, and is terminated as soon as medical necessity for the use is ended.

(3) The use does not result in the recreation of health, social, or occupational problems.

(4) The use does not result in the recreation of a physical addiction.

(5) The use does not reactivate the symptoms of obsession, compulsion, or drug seeking behavior.

B. *Religious Use*: At times religious or spiritual ceremonies involve the use of mood altering drugs as a necessary part of the ritual experience (i.e. wine at Catholic Mass, Peyote at Native American Indian rituals). Such use can constitute a high relapse risk, but the use itself does not necessarily constitute a relapse. The following criteria should be used to determine if religiously prescribed use has induced a state of relapse:

(1) The use occurs under appropriate supervision of a trained and experienced religious leader and is deemed necessary for the spiritual growth of the individuals.

(2) The use per se does not constitute psychological dependence (reliance upon the drug to comfortably and successfully complete normal acts of daily living).

(3) The use per se does not constitute abuse (the creation of psychological, behavioral, social, occupational, or health problems as a direct consequence of use).

> (4) The use per se does not constitute dependence (the use of drugs with physically addicting properties that would result in increased tolerance or physical dependence resulting in a withdrawal syndrome as a direct consequence of use).
>
> (5) The use is infrequent and the quantities and types of drugs used is carefully regulated in a manner that guards against dependence, abuse, or addiction.
>
> (6) The use is limited to the strictly defined religious or spiritual purpose, does not exceed prescribed doses, and is terminated as soon as the purpose is accomplished.
>
> (7) The use does not reactivate the symptoms of obsession, compulsion, or drug seeking behavior.

As an example, the use of the normal amount of alcohol by a priest in a Roman Catholic ceremony could not be considered a "relapse". However, if a priest uses alcohol in the Mass to alleviate personal problems, or becomes obsessive about the use to the extent that it becomes a distraction in his daily life, or begins using quantities over and above what is required for the ceremony, a relapse is likely to have occurred.

The use of peyote in a religious ceremony of the Native American Church, conducted by a bona fide Road Chief or Medicine Man, is analogous to the example of the priest in the Catholic ceremony. If the use of peyote in the ceremony is infrequent (i.e. only a few time [*sic*] per year); if the use is confined to that ceremony, only in a religious context; if the participant is using the peyote to achieve spiritual ends rather than to escape from life's problems through mood alteration; if there is no compulsion or obsession for peyote or alcohol between ceremonies; and if no adverse life consequences result over the period of use (say, five years of participation in the ceremonies), then the use would not constitute a relapse.

There is no clear-cut evidence that peyote impacts on the same neurological or neurochemical systems as does alcohol.

[signature and certification omitted in printing]

AFFIDAVIT OF DR. ROBERT BERGMAN

STATE OF WASHINGTON)
) ss.
County of King)

I, Dr. Robert Bergman, being first duly sworn, depose and say as follows:

I am a Clinical Associate Professor of Psychiatry at the University of Washington. I also have a private practice in psychiatry in Seattle, Washington. I completed my residency in psychiatry at the University of Chicago.

Prior to my appointment at the University of Washington, I was an Associate Professor of Psychiatry at the University of New Mexico. From 1975 to 1981, I also served as Director of Residency Training in Psychiatry at the University of New Mexico.

From 1966 to 1975 I was employed by the Indian Health Service in Window Rock, Arizona, and Albuquerque, New Mexico. From 1969 to 1975 I was Chief of Mental Health Programs for the Indian Health Service nationally. For the three years prior to that I was Chief of the Mental Health Program for the Navajo Area Office.

In my capacity with the Indian Health Service, I had occasion to become very familiar with the religious practices of the Native American Church. I have treated hundreds, perhaps over a thousand, persons who were members of the Native American Chuch [*sic*]. I have authored a chapter entitled "The Peyote Religion and Healing" in the book RELIGIOUS SYSTEMS AND PSYCHOTHERAPY, published in 1973 by Thomas Publishers of Springfield, Illinois, and an article entitled "Navajo Peyote Use - Its Apparent Safety" for the AMERICAN JOURNAL OF PSYCHIATRY, Volume 12, No. 6, December 1971.

The Native American Church, and its ceremony involving the use of peyote, is the single most effective manner of treatment for Indian alcoholism and other drug abuse. It is not the best treatment for everyone, but it is the best treatment for Indians. Thousands of Indian people have gained control of a drinking problem through the Native American Church. The use of peyote is essential to the Church and its practices, analogous to the sacramental offerings in the Roman Catholic Church.

There is no positive correlation between alcoholism and the use of peyote in a Native American Church ceremony. On the contrary, there is a great deal of evidence pointing the opposite way — that the use of peyote in ceremonies of the Native American Church helps the participants to control and overcome a problem with alcohol. Whereas the abuse of alcohol leads to terrible effects upon the mental and physical health of the individual and upon surrounding friends and family, it is extremely rare for the use of peyote in a Native American Church ceremony to lead to any such negative effects. The hallucinogenic effect of the drug has generally been exhausted by the time the religious ceremony is complete.

Although a general theory in alcohol and drug abuse treatment is that the use of any mind-altering drug or alcohol is likely to result in relapse, an important exception is the use of peyote by Indians in ceremonies of the Native American Church.

Not only is the use of peyote in a Native American Church ceremony helpful in maintaining sobriety; if a church member were not allowed to practice his or her religion or to use peyote in the ceremony, that denial would itself threaten the individual's sobriety.

[signatures and certification omitted in printing]

AFFIDAVIT OF OMER C. STEWART

STATE OF COLORADO)
) ss.
County of Boulder)

I, Omer C. Stewart, being first duly sworn, depose and say as follows:

I am a Professor of Anthropology at the University of Colorado, Boulder, Colorado. A copy of my resume is attached to and incorporated as part of this affidavit [omitted in printing].

In 1937, I attended my first peyote religious meeting, and in 1938 I began lecturing and publishing articles on the use of peyote in Indian religious ceremonies. The list of my publications, including numerous mongraphs [*sic*], articles and book reviews dealing with peyote, is attached to and incorporated as part of this affidavit [omitted in printing].

The first peyote religious meeting I attended was with the Ute Tribe. Since then I have attended ceremonies conducted under the Northern Pauite [*sic*] Tribe, the Washo Tribe, the Navajo Tribe, the Taos Pueblo Tribe, the Kiowa Tribe, the Sac and Fox Tribe, the Otoe Tribe of Oklahoma, the Winnebago Tribe of Wisconsin, the Sioux Tribe, the Northern Arapahoe Tribe, The Wind River Shoshone Tribe, and the Northern Cheyenne Tribe. The most recent peyote religious meeting I attended was approximately four years ago on the Colville Reservation in Washington.

I have maintained an interest in the teaching and study of religion all my professional life, whether it be the Sun Dance or Peyote Ceremonies of American Indians, the Moslem faith of Eygpt, the celebration of Mass within the Roman Catholic Church, the practices of the Morman Church, or any other religion.

The peyote religious meeting is a spiritual gathering. It consists of prayer, singing and meditation throughout a period from sunset to sunrise, often lasting up to fourteen hours. The use of peyote is essential to the ceremony. It assists the participants in maintaining a feeling of well-being throughout the ceremony and in gaining spiritual fulfillment.

The peyote ceremony is in no way a substitute for alcohol. In fact, the peyote ceremony assists a participant in resisting the use of alcohol by providing a sense of self-awareness and faith. I believe it is fair to say that nothing has been shown to be as effective in combatting the negative effects of alcoholism as the use of peyote in an Indian religious ceremony.

I have participated in peyote religious meetings with Mr. Stanley Smart. He has been invited to California, Oregon, Nevada, and other states to conduct peyote ceremonies. He has co-lectured with me on the Native American Church at the University of Nevada. Mr. Smart is a recognized Road Chief or Medicine Man in the Native American Church.

[signatures and certification omitted in printing]

AFFIDAVIT OF STANLEY SMART

STATE OF OREGON)
) ss.
County of Linn)

I, Stanley Smart, being first duly sworn, depose and say as follows:

My home is in Ft. McDermitt, Nevada, where I am of the Paiute-Shoshone Tribe. I am employed at the Sweathouse Lodge, Cascadia School Building, 48085 Santiam Highway, Foster, Oregon, 97345. The Sweathouse Lodge is an American Indian Alcohol Treatment Center with a treatment policy and practice balanced between conventional therapy and cultural/spiritual practices. My position there is cultural therapist.

I have been an active member of the Native American Church since I was a small boy, about the age of seven. My father was a Road Chief or medicine man, and I was brought up within the spiritual context of traditional Indian religion. Thirty-one years ago, the elders of my tribe recognized my spiritual gift, and I have been serving as a Road Chief or medicine man ever since. I am now fifty-two years of age.

The first teepee ceremony I conducted, involving the use of peyote, took place twenty-nine years ago. Since then, I have conducted over a thousand such ceremonies, often up to four ceremonies a week. The use of peyote is central and essential to the teepee ceremony. Without peyote, there could be no religious aspect to the ceremony. All participants in a teepee ceremony ingest peyote, in the form of a finely ground powder. We believe that peyote, which assists a participant in communicating with the Creator, is itself a deity and an object of worship.

The ceremony has beneficial effects on recovered or recovering alcoholics, by providing spiritual strength to help with their problem. In addition to the religious and health benefits of the teepee ceremony, a major result is to encourage participants to avoid the use of alcohol in their daily lives.

Al Smith is one of the individuals who has participated in ceremonies I have conducted. He first participated in a ceremony five years ago, and has participated regularly, perhaps twice a year, since that time. He is a sincere member of the church. Mr. Smith's most recent participation in a teepee ceremony was on Saturday, March 3, 1984, at the Storm Ranch south of Bandon, Oregon. I was the Road Chief or medicine man at that ceremony.

[signature and certification omitted in printing]

AFFIDAVIT OF
REVEREND EMMERSON JACKSON

STATE OF NEW MEXICO)
) ss.
County of San Juan)

I, Reverend Emmerson Jackson, being first duly sworn, depose and say as follows:

I am the National President of the Native American Church of North America. I am serving my third term as national president, having been elected by Native American Church chapters throughout the United States, Canada and Mexico. I have been a national executive officer of the Native American Church for thirteen years, the last six as president.

I am a Navajo Indian, residing on the Navajo Reservation. I am a life-time member of the Native American Church, and a Road Man or Medicine Man recognized by the Church.

Among the fundamental purposes of the Native American Church of North America is to promote the morality and sobriety of its members. Peyote (Lophophosa [*sic*] Williamii [*sic*]) is accepted as a sacrament. No other mind-altering drug or alcohol or controlled substance is permitted by the Native American Church of North America.

In my capacity as an executive officer of the Native American Church, I have travelled to Canada, Mexico, and throughout the United States, as well as to several South and Central American countries, including El Salvador, Guatemala, and Equador. I have conducted or participated in Native American Church ceremonies with the Indian people of those countries.

In my capacity as an executive officer of the Native American Church, I have worked in consultation with the Drug Enforcement Administration regarding the use of peyote in the Native American Church's ceremonies. Specifically, I have advised the Drug Enforcement Administration with regard to 21 CFR 1307.31, which exempts from registration members of the Native American Church who use peyote in bona fide religious ceremonies. Under that regulation, peyote is not considered a "controlled substance" within the context of bona fide religious ceremonies of the Native American Church.

In my capacity as an executive officer of the Native American Church, I have also given testimony and provided information to the United States Congress in regard to the American Indian Religious Freedom Act of 1978, which acknowledges that a variety of federal laws have prohibited "the use and possession of sacred objects necessary to the exercise of religious rites and ceremonies", such as peyote, and which guarantees, among other things, the inherent right of Indians to the "use and possession of sacred objects, and the freedom to worship through ceremonial and traditional rites".

Mr. Stanley Smart, of Ft. McDermitt, Nevada, is a recognized Road Man or Medicine Man within the Native American Church. He is one of fifteen delegates-at-large for the National Executive of the Church, keeping the Church officers apprised of Church activities in the delegates' respective area.

As a Klamath Indian of more than one-quarter Native American Indian blood, accepting only peyote as a sacrament and no other "controlled substance", Al Smith's attendance at Native American Church ceremonies over a period of some five years qualifies him as a member of the Church.

[signatures and certification omitted in printing]

EXHIBIT 8: STATEMENTS

ASSOCIATED PSYCHOLOGICAL SERVICES
[letterhead omitted in printing]

June 26, 1984

Employment Division
Hearing Section
P.O. Box 1027
Eugene, OR 97440

Attention: Mr. Robert Gruber

Dear Sir:

I have been a counselor in private practice, focusing mostly on chemical dependencies and chemically dependent families and resulting dysfunctions, since 1978. Since 1980 I have been a Certified Alcoholism Counselor. As president of Steiner Consulting Services, I provide supervision, clinical consultations and training for treatment programs in Oregon. I specialize in relapse prevention and provide workshops in the relapse process and prevention throughout the state. I am Director of Training at Serenity Lane Substance Abuse Treatment Center, where I have provided training on alcoholism, other addictions, the counseling of chemically dependent people, etc., for counselors and counselor interns since 1982. I am chairman of the Board of Directors for the Oregon Council on Alcoholism, program chairman of the Board of Directors for the Oregon Institute of Alcoholism Studies, member and past chair of the Alcoholism Counselors Certification Board of Oregon, member of Board of Directors for the Association of Alcoholism and Drug Abuse Counselors of Oregon, and member of the National Association of Alcoholism and Drug Abuse Counselors. In 1983, the Association of Alcoholism and Drug Abuse Counselors of Oregon honored

me as Oregon Counselor of the Year and the National Assocation of Alcoholism and Drug Abuse Counselors chose me as 1983-1984 National Alcoholism and Drug Abuse Counselor of the Year. I earned a masters degree in counseling psychology from the University of Oregon, a bachelors degree in liberal studies from the University of New York, Albany, and a bachelors degree in sociology from Chapman College, Orange, California.

David L. Ohlms, M.D., in his booklet and movie, both entitled "Sedativism", discusses the critical need for the alcoholic to avoid all dry chemicals both prescription and non-prescription, which might contain tranquilizers or other psychoactive agents. The major concern is the triggering of returning to the use of alcohol with the inherent danger of loss of life.

Peyote is a hallucinogen which

> contains at least 15 pharmacologically active substances, the most important of which is the hallucinogen mescaline. Other alkaloids include a convulsant, a respiratory stimulant, and a reflex stimulant. It is generally agreed that mescoline [*sic*] taken in combination with the many other alkaloids in the peyote button produces more intense effects than mescoline [*sic*] taken alone (*Drugs and Drug Abuse*, Cox et al, 1983, p. 478).

In the same source, mescaline is reported to produce "a spectrum of effects similar to those of LSD and psilocybin, including vivid visual 'pseudohallucinative' and distortions. . . . and synesthesias. . . . Alterations in the perception of time, space, and body image can also frequently occur" (*Ibid*, p. 335). Of even greater concern are the statements that the "emotional response to these psychic effects may range from joy and exhilaration to extreme anxiety and even terror" with "no way to accurately predict how any user will react on any given occasion to mescaline. Even seasoned users who usually experience the desired effects may on other occasions experience intense distress" (*Ibid*, p. 335). Many central nervous systems and behavioral effects may result from the use of mescaline through ingestion of peyote buttons. These effects range from those reported above to memory impairment and the "inability to distinguish between reality and unreality" and even to "psychotic reaction in a small percentage of users" (*Ibid*, pp. 338, 340).

The purposes of elaborating on the extreme mood and mind altering effects of peyote are several. One is to make clear that peyote is a powerful and potent agent which does have sometimes long-lasting negative effects on its user with no predictability as to when that could happen. A very important reason for clarifying peyote as a mood/mind altering substance is to make clear that it does, in fact, distort the perceptions of the user.

This distortion of perception and the subsequent effects on judgment is in and of itself very risky for the alcoholic, as the alcoholic may use alcohol in order to deal with the negative effects of the peyote, convincing him/herself that "alcohol will help", "only a little won't hurt" (or matter), or that he/she needs alcohol in order to be okay.

The risk factor is significantly increased if the alcoholic is involved in the relapse process. Relapse is defined by Terence T. Gorski as

> a process that occurs within a patient. It manifests itself in a progressive pattern of behavior that reactivates the symptoms of a disease or creates related debilitating conditions in a patient who has previously experienced remission ("An Overview of Relapse Theory", Concept Outline, July, 1982).

All recovering alcoholics experience the relapse process at times while remaining abstinent. The risk is related to how

seriously entrenched the relapse is in the alcoholic, and whether he/she has the resources to maintain sobriety after experiencing the use of such a potent hallucinogen as is peyote. The more severely the relapse process operates within the alcoholic, the greater the changes are that use of peyote will lead to furthering the relapse process, preventing the alcoholic from returning to the recovery process, and precipitating the use of alcohol and other drugs.

Another major concern is how a recovering alcoholic/addict may convince him/herself that use of peyote (or wine or any other mood/mind altering substance) for religious, ceremonial, spiritual or any other reason is acceptable. The alcoholic who has truly accepted the powerlessness over alcohol and other drugs and admitted to his/her life's unmanageability (both of which are considered necessary in order to initiate recovery), probably knows that *any* use of a mood or mind altering chemical may trigger a drinking episode or the renewed use of other drugs. To convince him/herself that alcohol or other mood/mind altering drug use is acceptable, the recovering alcoholic would have need to reactivate his/her denial system. The denial reactivated would be similar to the denial systems used prior to or in the early phase of treatment to initially deny that alcoholism existed. When the alcoholic who has been in recovery begins to rationalize certain behaviors and attitudes related to his/her alcoholism/addictions, the denial has been reactivated and the relapse process has been reinstated. This may be the beginning of the debilitating process which, before it is ended, can cause the alcoholic to see his/her options as limited either to drink or use again, to suffer from accident proneness, physical or psychiatric illness, or to kill him/herself. The question must be asked whether a recovering alcoholic who wants to participate in a religious ceremony and use wine, peyote or other mood/mind altering substance is already involved in the relapse process, with an activated denial system, and whether this would make that person even more vulnerable to loss of control of use.

There is an exception to this strict avoidance of use of mood/mind altering substances. That exception is the use of medications prescribed and administered by a physician informed regarding alcoholism/addictions to other mood/mind altering drugs. When medical use of such drugs is necessary, the alcoholic/addict must have a strong, active support system and an intense daily recovery program, or plan of action, to follow while using the medication and for at least six weeks beyond last use in order to lessen the risk of abusing the prescribed drug, returning to use of alcohol, or using other mood/mind altering chemicals. In his Northwest Workshops, Terence T. Gorski has been a strong proponent of the use of prescribed medications when necessary and was adament that medical use is the only justifiable use of mood/mind altering drugs that strong measures, i.e., support system and recovery program, must be instituted to ensure maintenance of sobriety.

The use of alcohol and other mood/mind altering drugs cannot be taken lightly as this can become an issue of life and death for the alcoholic. We now know with scientific verification that alcoholism/addictions to other mood/mind altering drugs are a physiologically induced disease process and that faulty metabolism plays a major role in the development and progression of the disease.

The addiction process is caused by chemical reactions in the brain. There is evidence indicating this process in alcoholism is through an accumulation of isoquinolines, which are very addictive, in the brain. The problem is that there is no evidence as to how much of the isoquinolines must be present

in order for the addiction to be initiated or at what exact point the addiction begins. There is evidence indicating the isoquinolines stay in the brain, even when the alcoholic is no longer drinking or using. It is believed that these isoquinolines are reactivated and reinstate the active addiction when the turn to drinking occurs. As there is also no information as to how much alcohol is required to reactivate the isoquinolines in any individual, any use of alcohol must be considered as risk taking and potentially life threatening. Therefore, use of any substance which would increase the chances of using alcohol, or the use of alcohol even for religious purposes, must be strictly avoided as costs may be far too high.

While this discussion has been general in regard to alcoholism and addictions to other mood/mind altering drugs, there is a strong need to address the importance of the role modeling of the alcoholism/drug abuse treatment professional. Frequently the first treatment person with whom the alcoholic/addict comes in contact becomes the role model for that alcoholic/addict who will often structure his/her recovery program like that of the treatment person. When the treatment person is not an alcoholic/addict, the advice and recovery planning assistance of the treatment person, along with modeling after that person are included in the alcoholic/addicts new lifestyle. Due to the severity of the denial that exists within people who have the disease of alcoholism/addiction, any evidence they can grasp that supports their hope and perceived need to continue to use their drugs of choice will become a firm component of their denial system. When any professional in this treatment field presents him/herself in such a manner that he/she presents any support for the denial system of the alcoholic/addict, that professional may be providing iatrogenic treatment. It is imperative that treatment professionals not misuse or abuse drugs. For the treatment professional who is also a recovering alcoholic/addict, no use of alcohol other [*sic*] or other drugs except for supervised medical care is acceptable.

It is of utmost importance that treatment programs employ professionals who have the best interests of their clients in mind, who understand that importance of their modeling sobriety and health in recovery for their clients, and who have satisfactorily dealt with their own issues regarding alcoholism/addiction when they exist, even to the extent of making sure there are people in their lives who will intervene when the relapse process, including reactivated denial, is in operation. Any treatment program which maintains in its employ a person who abuses or misuses alcohol or other drugs, even for religious purposes, loses credibility, validity and the respect of the community and other treatment programs and professionals.

Very truly yours,

/s/ Joseph R. Steiner, M.S., C.A.C.

[signatures and certification omitted in printing]

STATEMENT OF JOHN L. DESMET

I, John L. DeSmet, offer the following statement in response to an Affidavit of Terence T. Gorski, dated 8th day of May, 1984. I swear that the facts I am about to give are true, and that the opinions I will offer represent to the best of my knowledge, prudent and reasonable care in the treatment of chemically dependent individuals.

I am currently the Director of the Alcohol Dependence Treatment Program at the V.A. Medical Center in Roseburg, Oregon. This program is a 31 bed inpatient, hospital-based program for chemically dependent individuals with a strong outpatient and aftercare component. On my staff I have a psychiatrist, clinical psychologist, three psychiatric social workers, three rehabilitation technicians, a registered nurse, and various other allied medical personnel. Prior to this assignment I was the Clinical Director of the Alcohol and Drug Abuse Division for the Department of the Army at Fort Ord, California. This program was both an outpatient and residential program for both alcohol and drug addicted individuals. In addition I have taught courses in the behavioral sciences for counselors, at both the graduate and undergraduate level at various colleges and universities to include Kansas State University, University of California at Los Angeles, Extension Division, and Chapman College. Like Mr. Gorski, I have been training in the field of alcoholism for the last decade and have trained thousands of individuals in the area of the denial system. In addition I have a private practice and a private consulting firm.

I have had the privilege of attending one of Mr. Gorski's workshops on relapse prevention and relapse dynamics. I was favorably impressed with Mr. Gorski's grasp of the subject matter and his expertise in presenting his material and relating to his audience. In my opinion Mr. Gorski is not only an excellent facilitator and trainer, but perhaps one of the leading experts in the field of the relapse dynamic.

In reviewing Mr. Gorski's affidavit I would strongly concur with his definition of "relapse episode" and the specific criteria he lists to determine if a relapse is indeed taking place. One of the major points of Mr. Gorski's presentations was not included in his affidavit and I believe has major impact; that point is that a person is in the process of relapse or the process of recovery. Furthermore, when a person is in the process of relapse this is most often an unconscious, compelling force over which the individual has little control unless he or she has a well structured support system to intervene in his relapse dynamic.

Mr. Gorski spelled out very well the conditions under which medical treatment may involve the use of mood altering drugs as a necessary part of that medical treatment. He then states that "such use can constitute a high relapse risk, but the use itself does not necessarily constitute a relapse". I would concur with the statement that appropriate medical use of a mood altering drug does not necessarily constitute a relapse. However, I would add that such use not only can constitute a high relapse risk, but in fact does constitute a greater risk of relapse. Working in a medical center I have seen time and time again a chemically dependent individual being placed on pain medication or other mood altering drugs for a specific medical reason, and this use resulting in a return to drug dependency and all the dysfunctional behavior that goes along with dependency. Drug substitution is a common factor for many alcoholics and chemically dependent individuals. The use of any mood altering chemical increases the potential for a full blown relapse and therefore it is reasonable and prudent medicine to assume that one must strengthen the recovery program and increase the support services available to any individual who is undergoing any kind of medical treatment or physical trauma, but especially those conditions which require the introduction of mood altering drugs.

In the area where Mr. Gorski talks about the religious use of mood altering chemicals I take exception. Mr. Gorski states "at times religious or spiritual ceremonies involve the use of mood altering drugs as a necessary part of the ritual (i.e., wine at Catholic Mass, peyote at Native American Indian rituals)". First of all, wine at a Catholic Mass is not seen by the Catholic Church as a necessary part of the Eucharistic or Communion experience. I have treated Catholic priests in the past, and Catholic priests who are alcoholic are allowed and encouraged by the hierarchy in the Catholic Church to utilize grape juice in the celebration of the Eucharistic Feast. Mr. Gorski adds, however, that "such use can constitute a high relapse risk, but the use itself does not necessarily constitute a relapse". I maintain as in the case with the medical use that such use in fact not only can constitute a high relapse risk, but does increase the risk of relapse. Mr. Gorski indicates that one of the criteria for this use of mood altering drugs for spiritual purposes is that the use per se does not constitute abuse which he defines as "the creation of psychological, behavioral, social, occupational, or health problems as a direct consequence of use". If an individual uses such drugs knowing full well that the ingestion of such a drug is against the personnel policy of the organization to which he or she belongs, then such use must be interpreted as having severe occupational and vocational consequences. This use despite severe occupational consequences constitutes relapse according to Gorski's model.

In the years of training and supervising social workers, pyschologists, psychiatrists, and other mental health professionals in the substance abuse field, as well as in general mental health, it is increasingly clear that the therapist's or counselor's credibility with the client population is one of the key factors in terms of counselor effectiveness. Mr. Al Smith was hired for his position as a counselor, not because he possessed any degree in the counseling field. He was not hired as a mental health professional. He applied to the Douglas County Council on Alcohol and Drug Abuse Prevention and Treatment as a recovering alcoholic, offering the expertise of his own personal experience in finding a way out of the nightmare of alcohol dependency. He knowingly applied for and accepted a position with an agency which has a stated goal and belief system that abstinence is the only reasonable and prudent goal for drug dependent individuals. With the lack of any professional training, what Mr. Smith marketed when he came to the Douglas County Council on Alcohol and Drug Abuse Prevention and Treatment was his own lifestyle of recovery. This appears to be a key factor in this dispute. Mr. Gorski indicates that the use of peyote in small quantities for spiritual ends does not necessarily constitute relapse. I would suggest that the small quantities are irrelevant. This is a potent mood and mind altering drug. The drug produces hallucinations. The hallucinations are intended to produce a spiritual experience. Nevertheless, we know that alcoholics and other chemically dependent people often use drug substitution as a method of constituting chemical dependency. We also know that lack of congruence on the counselor's part seriously impacts on his credibility with his clientele. It is also clear that denial is one of the key factors in the disease of chemical dependency and that this denial is often unconscious and often supported by other members of the community. I maintain that alcoholism and other chemical dependency is a serious illness which has limiting conditions attached to it. Mr. Gorski's workshops support this

strongly. It is clear that recovering alcoholics and other chemically dependent people cannot place themselves in postions where they are in stress for any length of time. Recovering alcoholics and drug addicts need to pay closer attention to dietary concerns and ensure the proper rest and exercise if they are to increase their probability of success in recovery. In all of medicine there are different limiting conditions for various types of illnesses. Commen [*sic*] sense and this history of medicine shows [*sic*] that it is reasonable and prudent for individual [*sic*] to take the medically safer course. To insist that one has the right to wine at a Catholic religious experience or peyote in a Native American religious experience, at [*sic*] that this ingestion does not increase the likelihood of relapse is not consistent with the available experience of this practitioner. When a former heroin addict is placed in the hospital for a surgical procedure and administered an opiate derivative to manage the pain in the post-surgery process, the cells do not disregard the ingestion of another opiate just because it is for medical reasons; the cells do not distinguish the reasons for which the drug was taken. Centuries of tradition in medical practice would indicate that the safe, reasonable, prudent, common sense approach would be for individuals to find other ways to manage pain or achieve religious and spiritual highs without the ingestion of mood altering chemicals. Such use does increase greatly the chance for relapse. A counselor who offers himself as a role model and yet who knowingly places himself in a position which increases his likelihood for relapse certainly impairs his credibility significantly with his clientele and in my opinion is no longer an asset to an organization. And while an individual has a right to use alcohol or drugs in any manner he or she sees fit, I believe equally that an employer has a reasonable right to hire the paraprofessional, recovering staff member who will support the goals of the agency, which are not only abstinence, but taking all reasonable and prudent measures necessary to reduce the chance of relapse, not increase the chance for relapse.

[signatures and certification omitted in printing]

STATEMENT OF JOHN GARDIN II

[letterhead omitted in printing]

I, John G. Gardin II, being duly sworn depose and say:

I am currently the Executive Director of the Douglas County Council on Alcohol and Drug Abuse Prevention and Treatment (ADAPT) and have held this position since January 1, 1981. In this position I have responsibility for administering a private, non-profit alcoholism and drug addiction treatment agency with an annual budget of better than $600,000 and a staff of approximately 23 individuals. My duties include overall fiscal and programmatic planning, implementation, supervision, and evaluation of both outpatient and inpatient programs.

I am a Doctoral candidate in Clinical Psychology from the University of Tennessee, and expect to receive my degree in January of 1985. In addition I have a Masters of Science in Psychology. I have received advanced training in many modes of psychotherapy and have specialized in substance abuse, and addiction, incest, and marriage and family counseling. I have taught undergraduate courses in Psychology, as well as co-lead trainings for Corrections Division staff for substance abuse, both of which are accredited with the Board of Police Standards and Training.

I am immediate past President of the Alcoholism and Drug Addiction Program Directors Association of Oregon and have served on numerous boards and task forces throughout the state of various organizations in the addictions field.

It has been the position of ADAPT since its inception in 1969 that the only responsible and prudent course of recovery for an alcoholic and/or addict is total abstinence. Even though some controversy may be found in the literature as regards this issue, the overwhelming majority of professionals in the field of addictions concur that abstinence is the more appropriate course. The Alcohol and Drug Program Office of the Mental Health Division for the State of Oregon has made it clear to those programs which are funded by the State that the most appropriate treatment for alcoholism, as distinct from problem drinkers, is abstinence.

As an agency, we are committed to the belief that the addicted individual is in need of not only specific treatment as regards his or her addiction, but also information on general lifestyle issues. We have found that our clients are extremely challenging and that their addictive disease places them in a position of great defiance with respect to most authority figures. As a group our clients are extremely critical and demanding of those who counsel them. As a result, while we do not expect perfection from our counselors, we do expect consistency with the principles upon which our agency is founded, most notably in this case, the principle of abstinence. As is well known throughtout the mental health profession, the most valuable tools a counselor brings to the therapeutic process are those related to role modeling. In other words, the client learns more from watching how the counselor lives than by listening to what the counselor says. We believe it absolutely counterproductive within this field to preach total abstinence as the most prudent and responsible course of recovery, and then have a counselor on staff who is unwilling to abide by that principle. It should also be noted that as an agency which acquires funding from many sources in order to maintain operations, there are some sources of our funding which would be withdrawn if we were not an abstinence-oriented agency. This would most notably occur in the funds which we receive from the Veterans Administration. I have been told in no uncertain terms that such funding would be withdrawn if staff employed by our agency

were not practicing abstinence in their own personal recovery programs.

As a professional I take alcoholism and drug addiction as very serious diseases. With proper and prudent treatment, alcoholics and addicts can return to productive and happy lives. It is my belief, and that of the agency which I direct, that to be anything less than prudent is irresponsible when the price paid by the client can be so high.

DATED this 26th day of June 1984.

[signature and certification omitted in printing]

OPINION OF OREGON SUPREME COURT

[Opinion set forth in full as Appendix A, pages App-1 to App-7 of the printed petition for certiorari for *Employment Division v. Black*]

ORDER OF OREGON SUPREME COURT

[Order set forth in full as Appendix B, page App-9 of the printed petition for certiorari for *Employment Division v. Black*]

OPINION OF OREGON COURT OF APPEALS

[Opinion set forth in full as Appendix C, pages App-11 to App-22 of the printed petition for certiorari for *Employment Division v. Black*]

DECISION OF OREGON EMPLOYMENT APPEALS BOARD

[Decision set forth in full as Appendix D, pages App-23 to App-25 of the printed petition for certiorari for *Employment Division v. Black*]

OPINION OF OREGON SUPREME COURT

[Opinion set forth in full as Appendix A, pages App-1 to App-13 of the printed petition for certiorari for *Employment Division v. Smith*]

ORDER OF OREGON SUPREME COURT

[Order set forth in full as Appendix B, page App-15 of the printed petition for certiorari for *Employment Division v. Smith*]

OPINION OF OREGON COURT OF APPEALS

[Per Curiam opinion set forth in full as Appendix C, page App-17 of the printed petition for certiorari for *Employment Division v. Smith*]

DECISION OF OREGON EMPLOYMENT APPEALS BOARD

[Decision set forth in full as Appendix D, pages App-19 to App-20 of the printed petition for certiorari for *Employment Division v. Smith*]

PETITIONER'S

BRIEF

③

No. 86-946
No. 86-947 ③

Supreme Court, U.S.
FILED
MAY 29 1987
JOSEPH F. SPANIOL, J
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

EMPLOYMENT DIVISON,
DEPARTMENT OF HUMAN RESOURCES,
of the STATE OF OREGON
RAY THORNE, Administrator
and ADAPT,

Petitioners,

v.

ALFRED SMITH (No. 86-946)
and GALEN W. BLACK (No. 86-947)

Respondents.

On Writ of Certiorari to the Supreme Court
of the State of Oregon

BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinions of the Oregon Supreme Court are reported as *Smith v. Employment Div.*, 301 Or. 209, 721 P.2d 455 (1986) and *Black v. Employment Div.*, 301 Or. 221, 721 P.2d 451 (1986).

JURISDICTION

The opinions of the Oregon Supreme Court were dated and filed on June 24, 1986. The court denied the state's timely petition for reconsideration by order dated September 3, 1986. Jurisdiction to review the Oregon Supreme Court's judgments is conferred upon this Court by 28 U.S.C. § 1257(3) (1983). The petitions for writ of certiorari were timely filed on December 2, 1986, and allowed on March 9, 1987.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

United States Constitution, Amendment I provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .

Oregon Revised Statutes (Or. Rev. Stat.) § 657.176(2) (1985) provides:

> An individual shall be disqualified from the receipt of benefits until the individual has performed service in employment subject to this chapter, or for an employing unit in this or any other state or Canada or as an employe of the Federal Government, for which remuneration is received which equals or exceeds four times this individual's weekly benefit amount subsequent to the week in which the act causing the disqualification occurred, if the authorized representative designated by the assistant director finds that the individual:

> (a) Has been discharged for misconduct connected with work, or
>
> (b) Has been suspended from work for misconduct connected with work, or
>
> (c) Voluntarily left work without good cause, or
>
> (d) Failed without good cause to apply for available suitable work when referred by the employment office or the assistant director, or
>
> (e) Failed without good cause to accept suitable work when offered.

Oregon Administrative Rule (Or. Admin. R.) 471-30-038(3) (1986) provides:

> Under the provisions of ORS 657.176(2)(a) and (b), misconduct is a wilful violation of the standards of behavior which an employer has the right to expect of an employe. An act that amounts to a wilful disregard of an employer's interest, or recurring negligence which demonstrates wrongful intent is misconduct. Isolated instances of poor judgment, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience are not misconduct for purposes of denying benefits under ORS 657.176.

STATEMENT OF THE CASE

Black and Smith both worked for Douglas County Council on Alcohol and Drug Abuse Prevention and Treatment (ADAPT) as rehabilitation counselors.[1] Black was recovering from alcohol and drug addiction and had not used drugs or alcohol since early 1982. (Black Rec. 9). Smith considers himself a recovered alcoholic. (Smith Tr. 42). He has not consumed alcohol for many years. (Smith Tr. 42-43).

ADAPT subscribes to the treatment philosophy that alcoholism and drug abuse are continuing diseases and that alcoholics and drug addicts must abstain totally from drug and alcohol use in order to control the disease and avoid relapse. ADAPT also believes that its recovering counselors serve as valuable role models for its clients. Therefore, ADAPT's personnel policies provide that any staff member may be discharged for misuse of alcohol or other mind-altering substances. (Black Rec. 9, Exh. 2; Smith Rec. Exh. 3).

When hired, Black and Smith each agreed in writing to adhere to ADAPT's personnel policies and to avoid all substance abuse. Both Black and Smith knew that ADAPT considered any use of alcohol or alleged nonprescription drugs by a recovering person to be substance abuse. (Black Tr. 23, 33, 42; Smith Rec. Exh. 3).

Black is not a Native American, (Black Tr. 31), but he is a member of the Native American Church. On September 10, 1983, he ingested a small amount of peyote during a teepee ceremony of the Native American Church. ADAPT learned of Black's conduct and offered to let him continue as a counselor if he would accept residential treatment for substance abuse. Alternatively, ADAPT offered to let Black resign. When Black would do neither, ADAPT fired him. (Black Exh. 1).

Smith is a Klamath Indian. (Smith Tr. 45). He first attended the Native American Church in 1978. (*Id.*). He has attended two peyote ceremonies per year since then and has become a member of the Church. (*Id.*; Smith Rec. Exh. 7, Aff. of Al Smith).

On September 19, 1983, shortly after Black used peyote at the teepee ceremony, Smith met with his employer to discuss his alleged earlier consumption of peyote at a religious ceremony. (Smith Rec. Exh. 6). The employer reminded Smith that personnel policies did not permit peyote use. (*Id.*). Smith denied having ingested peyote and renewed his commitment to abide by ADAPT's drug-free policy. (*Id.*).

On December 5, 1983, ADAPT issued a memorandum to all of its employees, reaffirming that:

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[1] Except where noted, the facts set forth in the Statement of the Case are taken from the opinion of the Oregon Supreme Court.

> In keeping with our drug-free philosophy of treatment, and our belief in the disease concept of alcoholism, and the associated complex issues involved in both alcoholism and drug addiction, we require the following of our employees:
>
> 1. Use of an illegal drug or use of prescription drugs in a non-prescribed manner is grounds for immediate termination from employment. . . .

On Friday, March 2, 1984, Smith informed ADAPT's executive director that he planned to attend a Native American Church teepee ceremony during the weekend of March 3-4, 1984, and he planned to ingest peyote at the ceremony. (Smith Rec. 4). The executive director informed Smith that if he consumed peyote, he would have the option of resigning or enrolling in an employee-assistance program for evaluation. (*Id.*).

On Saturday, March 3, 1984, Smith used peyote at the teepee ceremony. On Monday, March 5, 1984, he informed his employer of that fact. When Smith refused to resign or submit to an evaluation, ADAPT discharged him.

Black and Smith both applied to the Employment Division for unemployment benefits. At the hearings on their benefits claims, each asserted a right to ingest peyote as part of a religious ceremony. An Employment Division referee concluded that Black's ingestion of peyote was an "isolated instance of poor judgment" and thus not misconduct justifying denial of benefits under Or. Admin. R. 471-30-038(3) (1986). At Smith's subsequent hearing, the same referee concluded that, although Smith had been fired for misconduct, he was not disqualified from receiving benefits. Relying on this Court's decisions in *Sherbert v. Verner* ("*Sherbert*"), 374 U.S. 398 (1963), and *Thomas v. Review Bd. of Ind. Employment Sec. Div.* ("*Thomas*"), 450 U.S. 707 (1981), the referee ruled that the first amendment barred the state from disqualifying Smith from receipt of unemployment benefits. (Smith Rec. Item 4 at 506).

ADAPT petitioned for administrative review of both referee's decisions. The Employment Appeals Board adopted the referee's factual findings in each case, but held that both Black and Smith had engaged in misconduct in connection with work.[2] In Smith's case, the board ruled that his use of peyote was not protected by the first amendment because peyote use was unlawful in Oregon, and because "[t]he compelling state interest is in the proscription of illegal drugs, not merely in the burden upon the Unemployment Compensation Trust Fund." (Smith Rec. Item 9, p. 25).[3]

Black and Smith each petitioned the Oregon Court of Appeals, Oregon's intermediate appellate court, to review the board's decisions. The Court of Appeals disagreed with the board in each case. The court concluded that denial of unemployment benefits substantially burdened claimants' free exercise of religion and the state had not demonstrated a compelling interest justifying the infringement. *Black v. Employment Div.*, 75 Or. App. 735, 707 P.2d 1274 (1985). Smith's case was reversed and remanded for reconsideration in light of the decision in *Black*. *Smith v. Employment Div.*, 75 Or. App. 764, 709 P.2d 246 (1985).

The Oregon Supreme Court granted the state's petitions for review in both cases. In its decision in *Smith v. Employment Div.*, 301 Or. 209, 721 P.2d 455 (1986), the court first considered whether the state constitution required payment of benefits. It concluded that the statute and administrative rule defining misconduct did not discriminate against Smith's religious practices or beliefs because both the law and rule were facially neutral and were applied even handedly. The court therefore concluded that there was no state constitutional violation because any interference with Smith's freedom to worship was committed by his employer, not by the state through its unemployment statutes. *Id.*, 301 Or. at 216, 721 P.2d at 449. However, the Oregon Supreme Court felt "constrained" to hold, in light of this Court's decisions in *Sherbert* and *Thomas*, that claimant was entitled to benefits under the first amendment to the federal constitution. *Id.*, 301 Or. at 218, 721 P.2d at 450. Relying on its analysis in *Smith*, the Oregon Supreme Court held that denial of unemployment benefits also violated Black's rights under the Free Exercise Clause of the first amendment. *Black v. Employment Div.*, 301 Or. 221, 721 P.2d 451 (1986).

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[2] Oregon's misconduct statute permits no good cause exceptions. Or. Rev. Stat. § 657.176(2)(a) (1985).

[3] The board did not reach the first amendment issue in Black's case because the only issue decided by the referee was whether Black's conduct constituted misconduct or merely an isolated instance of poor judgment. Black was unrepresented at the hearing and before the board. The religious exercise claim was raised and addressed at the Oregon Court of Appeals level.

SUMMARY OF ARGUMENT

The issue for resolution in these cases is whether the Free Exercise Clause compels a state to award unemployment benefits to drug rehabilitation counselors who are fired for misconduct after ingesting peyote as part of a religious ceremony. In several prior decisions, this Court has held that when an employee's disqualification from benefits is a consequence of the employee's sincerely held religious beliefs, the state's disqualification scheme must yield to the religious practice or belief. Any other result puts the employee to the choice of following his or her religious convictions or being denied unemployment benefits.

This case differs significantly from the prior cases. No other case before this Court has involved a discharge for job-related misconduct that also violated state criminal law. The distinction is decisive. If an individual cannot lawfully engage in particular conduct, even when religiously motivated, there is no free exercise interest to assert. Unless the Constitution requires the state to exempt religious drug use from its criminal prohibitions, an employee fired for misconduct as a result of illegal drug use should not be able to claim that his or her free exercise interests are burdened by the disqualification from unemployment benefits.

The question must be whether the Constitution compels the creation of an exception for religiously motivated drug use; the answer is that it does not. Arguably, peyote[1] can be ingested in safe amounts. But it remains a highly dangerous drug capable of inflicting severe physical damage and perhaps even death. The state has a strong and obvious interest in controlling the use of such a dangerous substance, even when the motivation for its use is religious. It would be difficult if not impossible for the state to regulate religious ceremonies to ensure that drugs are taken in safe amounts and for religious reasons only. Moreover, any limited exception to laws prohibiting drug possession and use seriously would hamper law enforcement by making it necessary to distinguish legitimate from illegitimate possession, use and trafficking.

The health and safety interests of the state therefore are sufficiently compelling to justify blanket criminal prohibitions of dangerous substances such as hallucinogenic drugs. That is true even though some states have chosen to create exceptions for peyote use in Native American religious ceremonies. Legislative bodies are entitled to assess differently the premium they place on citizen health and well-being; they are entitled to respond to drug abuse and criminal law enforcement problems on the basis of their varying experiences and resources. States have the power to conclude that ad hoc, religion by religion or drug by drug exemptions from a state's drug laws would weaken the fabric of those laws seriously, even if other sovereigns disagree or are willing for political or other reasons to risk those consequences.

Even assuming, under some theory, that religious use of peyote must be exempted from the criminal law's reach, that conclusion does not necessarily mean that unemployment benefits must be awarded to these employees. In Oregon, as in most or all jurisdictions, peyote and other hallucinogenic drug use remains criminal for the vast majority of the population and contrary to public policy. Although the Constitution may dictate that the state cannot *punish* religiously motivated drug use, the state should not be required to subsidize it. This case involves conduct of a kind generally within the reach of a state's regulatory authority. Apart from the unemployment compensation scheme, state laws reflect the government's deep concern with drug use generally and peyote use in particular. In such an instance, the state has an independent and religiously neutral interest in effectuating its drug abuse policies and not acting inconsistently with them. Under such circumstances, specially awarding benefits to claimants would result in preferential treatment of religion in a way that goes beyond the accommodation rationale of the Court's prior cases and in fact raises Establishment Clause concerns.

The state has an additional, independent interest in enforcing the disqualification for benefits because claimants' misconduct involved active interference with the employer's interests. In the prior litigation before this Court, the employees either quit or refused to work because the terms of their employment required them to violate sincerely held beliefs. Claimants Black and Smith did more: they expressly agreed to their employer's policy of drug abstinence and then violated that policy while maintaining their roles as drug rehabilitation counselors. They took this action rather than resign or decline to work on the employer's terms.

Active interference of this kind with an employer's direct business interests poses a special danger to the unemployment compensation system. Employers are forced participants in the scheme, supporting it with mandatory taxes that vary in proportion to successful employee claims. When a state's obligation extends to "accommodating" the religious beliefs of

those who actively subvert an employer's interests, respect for and public confidence in this unquestionably important benefit program is undermined. Accordingly, even if the Constitution immunizes these claimants from the reach of the state's criminal laws, the state's compelling interests in the integrity of its unemployment compensation scheme and the efficacy of its criminal law policies outweigh the burden on claimants' free exercise of religion. Claimants therefore are not entitled to benefits.

ARGUMENT

I. Introduction

Claimants in these consolidated cases are members of the Native American Church who were fired from their positions as drug and alcohol rehabilitation counselors after using peyote in religious ceremonies. Both individuals were qualified to be drug counselors, in part, because they had former drug and alcohol dependencies. Upon accepting employment, each claimant understood and agreed to the employer's policy that counselors abstain totally from the use of any alcohol or nonprescription drugs. The employer's policy reflected its treatment philosophy that successful therapy requires a client's complete abstinence from alcohol and nonprescription drugs. The policy also ensured that counselors were appropriate role models for the people they treated.

The employer's policy conflicted with each claimant's desire, pursuant to sincerely held religious beliefs, to use peyote as part of a Native American religious ceremony. The facts suggest that one or both of the employees were testing the employer's policy deliberately.[4] Rather than resign their

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[4] Black, who refused the employer's attempt to give him a "second chance," was the first to be fired. Smith, who until then had chosen not to violate the employer's policy, then found himself under pressure to change his mind and participate in peyote use during the teepee ceremonies. (Smith Tr. 37). Smith told ADAPT's executive director that Native American groups were trying to persuade him to attend a teepee ceremony on a particular weekend. (Smith Exh. 4). Smith apparently believed that his decision to

(Footnote continued on next page)

positions or refuse to perform their jobs on the employer's terms, both employees continued in their capacity as counselors and violated their employer's policy. They did so despite their employer's offers to assist in finding alternative employment (in Smith's case) or to continue as a counselor after assessment for a possible new substance abuse problem (in Black's case). They also engaged in peyote use despite state criminal laws which prohibit and punish its use. When they would neither resign nor comply with the employer's policy, the employer fired them.

Claimants unquestionably engaged in misconduct connected with their work under the terms of Oregon's unemployment compensation law, disqualifying them from benefits. The Oregon Supreme Court, however, reversed the board's denial of benefits. The court was unwilling to view the governmental interest at stake in these cases as in any way distinguishable from the interest at stake in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707 (1981). It declared that the state could look only to the unemployment compensation statutes as the source of its legitimate interest in denying compensation. The Court concluded, therefore, that the state's interest was limited to its financial interests in not paying benefits to these and similarly situated claimants.

The Oregon court offered no authority, principle or rationale for the limitation it placed on its assessment of the state interests. But by thus narrowing the range of those interests, the state court's conclusion was foregone. The court

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(Footnote continued from previous page)

take peyote had great significance because other church members wanted to use his case to test their rights to use peyote in their religious ceremonies. (Smith Tr. 51-52). Eventually, Smith rejected various alternatives offered by his employer (such as help in finding another job or attending the teepee ceremony without using the peyote) because he wanted to resolve the conflict over the existence of a right to engage in the religious use of peyote. (Smith Tr. 48-49, 55-56, 57).

did not announce a *per se* rule, but it necessarily created one: if the state's interests are always financial only, the burden of denying benefits for religiously motivated misconduct always will outweigh them. As a consequence, a state is constitutionally obligated to award benefits whenever a claimant sincerely asserts that he or she acted (or refused to act) for religious reasons, regardless how socially offensive or dangerous the conduct.

The Oregon Supreme Court's resolution of these cases runs afoul of this Court's refusal to declare "the existence of a constitutional right to unemployment benefits on the part of all persons whose religious convictions are the cause of their unemployment." *Sherbert v. Verner*, 374 U.S. at 409-10. The criminality of claimants' conduct powerfully distinguishes these cases from *Sherbert*, as does the claimants' insistence on actively undermining their employer's interests rather than resigning from work or refusing to work on terms that offended their religious beliefs. Nothing in *Sherbert*, *Thomas* or the Court's recent opinion in *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 107 S.Ct. 1046 (1987), commands or even suggests that courts must hold the myopic and sterilized vision of the state's interests adopted by the Oregon court in this case. *Sherbert* and its progeny in fact suggest an outer boundary beyond which religious conduct does not merit constitutional protection. These cases demonstrate that boundary by crossing over it.

II. Claimants' criminal conduct is not protected by the first amendment.

The fact of criminality, more than any other factor presented by these cases, distinguishes them from *Sherbert* and *Thomas*. Possessing or using peyote is a Class B felony under Oregon law, punishable by a maximum sentence of ten years imprisonment. Or. Rev. Stat. §§ 475.992(4)(a) (1985); 161.605(2) (1985). Oregon's criminal prohibition is absolute: there is no exception for religious use of peyote. The Oregon intermediate appellate court has held that the state legislature's refusal to exempt religious peyote use is constitutional. Higher appellate courts have declined to disturb that holding. *State v. Soto*, 21 Or. App. 794, 537 P.2d 142, *cert. denied*, 424 U.S. 955 (1976).

If Oregon may criminalize religious peyote use without running afoul of the Constitution, it necessarily follows that claimants cannot assert a burden on "protected" religious exercise interests. If the Constitution permits a state to prohibit certain conduct at any time for any purpose, including religious purposes, citizens have no free exercise interest to assert. At the point at which the Constitution permits conduct to be criminalized and severely sanctioned, the Constitution necessarily withdraws any protection to engage in that conduct.

Assuming the constitutionality of Oregon's criminal statute, the analysis in *Sherbert v. Verner* is inapposite. The state's interest cannot be weighed against the claimants' free exercise interest when they have no free exercise interest to assert. Claimants, in apparent recognition of this, have challenged the constitutionality of Oregon's statute. (Response to Pet. for Cert. at pp. 4-5). If that attack fails, as it must, their claim for benefits necessarily fails as well.

A. Government constitutionally may burden religion when its regulations serve compelling state interests that would be undermined by an exemption for religiously motivated conduct.

The starting point for the analysis must be the settled recognition that "[n]ot all burdens on religion are unconstitutional." *United States v. Lee*, 455 U.S. 252, 257 (1982). Where state regulation is supported by a compelling governmental interest, a state may require individuals to engage in conduct otherwise prohibited by their religion, *id.*, or to refrain from

actions that their religion directs them to take. *Reynolds v. United States*, 98 U.S. 145 (1878). *Accord Sherbert v. Verner*, 374 U.S. 398, 403 (1963).

Conduct that poses some substantial threat to public health, safety or order traditionally has been recognized as well within the reach of state regulatory authority under the "compelling interest" standard. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972) ("activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety and general welfare . . ."). As this Court declared in *Sherbert v. Verner*, 374 U.S. at 403, the state has a compelling interest in regulating religiously motivated conduct when "[t]he conduct or actions so regulated . . . posed some substantial threat to public safety, peace or order." Accordingly, state regulatory authority has survived religious challenges in such diverse but traditional health and welfare areas as child labor, *Prince v. Massachusetts*, 321 U.S. 158 (1944), polygamy, *Reynolds v. United States*, 98 U.S. 145 (1878), and disease control, *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (small pox vaccinations).

The proper analysis requires the state first to demonstrate a substantial health and welfare interest in its regulation, thus establishing a "compelling" governmental interest. The state also must demonstrate that to accommodate the religious-based conduct "will unduly interefere with fulfillment of the governmental interest," *United States v. Lee*, 455 U.S. 252, 259 (1982), and that "no alternative forms of regulation would combat such abuses without infringing First Amendment Rights." *Sherbert v. Verner*, 374 U.S. at 407. As applied to Oregon's criminal law prohibiting peyote use, the questions are: 1) whether the ingestion of peyote poses a substantial threat to public safety, welfare or order; 2) whether exempting religious peyote use would interfere with the state's interest;

and 3) whether the state is entitled to conclude that its interests would be hindered with less than a blanket prohibition of peyote use and possession. As the following analysis demonstrates, all of those questions must be answered in the affirmative.

B. The state has a compelling public health and safety interest in prohibiting the use of hallucinogenic drugs, including peyote.

The state's interest in regulating the possession and use of dangerous drugs, including hallucinogens, is of great weight. This Court has characterized that interest as "vital." *Whalen v. Roe*, 429 U.S. 589 (1977). As the Court recognized in *Whalen*, the state has a "vital interest in controlling the distribution of dangerous drugs," *id.* at 598, and "no doubt could prohibit entirely the use of particular Schedule II drugs . . . ." *Id.* at 603. Modern American experience provides vast and tragic evidence supporting stringent governmental control over distribution and possession of dangerous drugs.

It should be unnecessary to detail the public and private devastations caused by drug use and abuse in this nation. The contemporary effects of drug use are the subject of intense public concern at both national and local levels. For example, in 1986 the President launched a campaign to interdict illegal drugs and proposed the "Drug-Free America Act of 1986." *See* President's Message to the Congress Transmitting Proposed Legislation, 22 Weekly Comp. Pres. Doc. 1192 (Sept. 22, 1986). The presidential message accompanying the proposed legislation assailed illegal drugs as an enemy "as formidable as any we have ever encountered." *Id.* at 1194. *See also* Exec. Order No. 12,564, 51 Fed. Reg. 32,889 (1986) (calling for a drug-free federal workplace, requiring agency heads to fire federal workers who use illegal drugs and refuse rehabilitation). Similarly, Congress designated October 3, 1986, through October 11, 1986, as "National Drug Abuse Education and Prevention Week." S. J. Res. 354, 100 Stat. 1124 (1986). Congress then enacted the "Anti-Drug Abuse Act of 1986," Pub. L. No. 99-570, 100 Stat. 3207. State and local governments similarly have escalated their efforts to eliminate or reduce dangerous drug use and to lessen its toll on human lives.[5] In short, governmental health, safety and welfare interests in regulating dangerous drug use increase almost with every passing day.

Peyote (*Lophophora williamsii*) is a drug regulated by government throughout the country. It is derived from a cactus which grows in the southwestern United States and in Mexico.[6] The crown or "button" of the cactus, when dried and chewed, produces a psychedelic effect.[7] Peyote indisputably poses severe dangers to human health and well-being. Its major active ingredient is mescaline.[8] Low doses of mescaline produce "dilatation of the pupils, increased blood pressure and heart rate, an increase in body temperature, EEG and behavioral arousal, and other excitatory symptoms" similar to those produced by amphetamines.[9] Mescaline also produces vivid hallucinations,[10] usually both visual and auditory,[11] and can cause temporary psychosis.[12] High doses lead to "severe hypertension, a toxic acute brain syndrome (manifested by disorientation), a clouding of consciousness, and convulsions," as well as death or respiratory failure probably caused by "vasospasm of isolated cerebral arteries."[13]

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[5] Oregon is an example. In its 1987 session, the Oregon House of Representatives has passed and the Senate is considering a measure carrying increased criminal penalties for those involved in particular kinds of drug-related deaths. Or. H.B. 2288 (1987). House Legislative Calendar, Sixty-Fourth Or. Leg. Assembly, at H-34 (May 18, 1987).

[6] R. Julien, A Primer of Drug Action (3d Ed 1981) 148.

[7] *Id.*

[8] R. Julien, *supra*, at 149.

[9] *Id.*

[10] *Id.*

[11] W. La Barre, The Peyote Cult (1969 Ed.) at 141-42.

[12] Giannini, Price & Giannini, *Contemporary Drugs of Abuse*, 33 Am. Family Physician, March, 1986, at 207, 208.

Peyote presents the same type and degree of threat to health and safety as that posed by dangerous drugs generally and by all hallucinogens in particular. A state's interest in regulating peyote use, therefore, must be deemed as weighty as its broader interest in drug control. No jurisdiction in the United States has declined to exercise regulatory authority over drug use. No court in any jurisdiction or other authority suggests that dangerous drugs, such as hallucinogens, are not within the regulatory reach of the state and federal governments. Indeed, perhaps no other activity so classically is a proper object of government's regulatory power. The human health and public order concerns that underlie the government's interest in drug regulations are as great or greater than those that underlie child labor laws, polygamy prohibitions and mandatory vaccination requirements. Oregon's interest in the prohibition of peyote use and possession therefore cannot be characterized as anything less than compelling.

C. A state legislative body is entitled to conclude that a religious use exemption from its dangerous drug use regulations would unduly undermine its health and safety interests.

The remaining inquiries are whether the state's interest can be effectuated without prohibiting religious peyote use and whether some less restrictive alternative is available. The two inquiries, in this context, essentially blend into the single question of whether the state's health and safety interest requires a blanket prohibition on peyote use. A state is entitled to make the judgment that a complete ban on peyote drug use is needed, even if some other state political bodies have reached a different conclusion.

Religious use of peyote implicates the state's health and safety interests equally with other uses of the drug. Whether the drug is used in a religious ceremony, medicinally, for secular personal enlightenment or for recreation, a user's objective is to produce a hallucinogenic state. As already described, the physiological and psychological responses to peyote ingestion pose serious health hazards. Those health hazards are indifferent to the user's motivation for using the drug.

The state, accordingly, is entitled to be as concerned with religious peyote use as it is with any other religiously motivated conduct that threatens human health. As examples, handling poisonous snakes and drinking poison is no less a threat to the state's health and safety interests when religiously motivated than when done on a dare. *Cf. State ex rel. Swann v. Pack*, 527 S.W.2d 99 (Tenn. 1975) *cert. denied*, 424 U.S. 954 (1976) (enjoining such religions practices). The same is true of religiously motivated disfigurement: government's welfare interests are no less at stake when a person removes his eye and hand for religious rather than for secular reasons. *Cf. Mayock v. Martin*, 157 Conn. 56, 245 A.2d 574 (1968) *cert. denied*, 393 U.S. 1111 (1969) (mental commitment of man who engaged in self-mutilation for religious reasons). Simply stated, when conduct endangers human health and safety, government cannot deregulate religious use without compromising its interest in the regulation.

Nor can the state's interest in health and well-being be satisfied by regulations designed to ensure that only "safe" levels of peyote are consumed during religious ceremonies. A state cannot feasibly identify appropriate dosages on an individual basis, assuming there exists a consistently "safe" dosage for any given individual. Even if the state were to prescribe "safe" dosages for religious use, insurmountable enforcement problems would flow from any such regulatory attempts. State officials could not ensure that peyote would be ingested in lawful amounts unless they actually monitored the ceremony. The prospect of government so intruding on the inner sanctity of religious ceremonies presents obvious practical difficulties and raises deeply troubling entanglement questions under the Establishment Clause.

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[13] Altura & Altura, *Phencyclidine, Lysergic Acid Diethylamide, and Mescaline: Cerebral Artery Spasms and Hallucinogenic Activity*, 212 SCIENCE, May 29, 1981, at 1051. *See also* Reynolds & Jindrich, *A Mescaline Associated Fatality*, 9 J. OF ANALYTICAL TOXICOLOGY, July/August, 1985, at 183.

A state's interests are not limited to the health and well-being of individual peyote users, however. Its interests extend also to the efficacy of the entire scheme regulating dangerous drugs. If a state must exempt one group of religious users of dangerous drugs from the reach of its criminal laws, then it likely must exempt all religious drug use. Under settled free exercise and establishment clause principles, government cannot show partiality to any one religious group or promote one religion over the other. *Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968); *Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952). Some lower courts accordingly have held that Congress and state legislatures cannot permit members of one church to use an otherwise proscribed drug without making a similar exception for members of other churches. *E.g., Kennedy v. Bureau of Narcotics and Dangerous Drugs*, 459 F.2d 415 (9th Cir. 1972), *cert. denied*, 409 U.S. 1115 (1973) (federal exemption for Native American Church alone violates fifth amendment); *Native American Church of New York v. United States*, 468 F. Supp. 1247 (S.D. N.Y. 1979), *aff'd* 633 F.2d 205 (2d Cir. 1980).

A state's ability to protect the health of all its citizens and to enforce its drug laws would be crippled by criminal law exemptions for all religious use of controlled drugs. Reported appellate cases from across the country provide a sampling of the many religious organizations that already have sought exemption from criminal drug laws. Like members of the Native American Church, the Peyote Way Church has sought religious exemption from the laws against peyote use.[14] The Native American Church of New York has judicially pursued a religious exemption for all psychedelic drugs.[15] Members of the Aquarian Brotherhood Church have claimed a free exercise right to use marijuana, LSD and hashish for religious purposes.[16] Moslems have asserted a constitutional entitlement to smuggle heroin and marijuana.[17] The Ethiopian Zion Coptic Church, Hindus, Hindu Tantrists, the Twelve Tribes of Israel (Rastafarians), Tantric Buddhists and others all have sought exemptions from the laws prohibiting marijuana use.[18] This list is not exhaustive, but it graphically illustrates the legitimate concern that protected religious drug use would cause dramatic swelling of the ranks of such religious organizations and increase the use of illegal drugs.

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[14] *Peyote Way Church of God v. Smith*, 742 F.2d 193 (5th Cir. 1984). *See also In re Grady*, 61 Cal.2d 887, 394 P.2d 728, 39 Cal. Rptr. 912 (1964) ("'self-styled peyote preacher' and 'way shower'" claimed religious right to use peyote).

[15] *Native American Church v. United States*, 468 F. Supp. 1247, 1248 (S.D. N.Y. 1979), *aff'd* 633 F.2d 205 (2d Cir. 1980).

[16] *Missouri v. Randall*, 540 S.W.2d 156 (Mo. App. 1976).

[17] *United States v. Hudson*, 431 F.2d 468 (5th Cir. 1970) *cert. denied*, 400 U.S. 1011 (1971).

[18] *Olsen v. Iowa*, 808 F.2d 652 (8th Cir. 1986); *United States v. Rush* 738 F.2d 497, 511-13 (1st Cir. 1984) *cert. denied*, 470 U.S. 1004 (1985); *United States v. Middleton*, 690 F.2d 820 (11th Cir. 1982), *cert. denied*, 460 U.S. 1051 (1983); *Hawaii v. Blake*, 695 P.2d 336 (Hawaii App. 1985); *Wahid v. Oklahoma*, 716 P.2d 678 (Okla. Ct.) *cert. denied*, 106 S.Ct. 2899 (1986); *Whyte v. United States*, 471 A.2d 1018 (D.C. App. 1984); *Vermont v. Rocheleau*, 142 Vt. 61, 451 A.2d 1144 (1982); *Leary v. United States*, 383 F.2d 851 (5th Cir. 1967) *rev'd on other grounds*, 395 U.S. 6 (1969); *New Mexico v. Brashear*, 92 N.M. 622, 593 P.2d 63 (1979).

The state's ability to enforce its drug laws would decrease in inverse proportion to the consequent increase in the exempted use of otherwise illegal drugs. State criminal law would become a patchwork of prohibitions, covering some people for some drugs, and other people for other drugs. The state's ability to detect violations of state drug laws would be disabled by the difficulties inherent in distinguishing legitimate from illegitimate drug possession, use and trafficking. Moreover, exemptions for religious uses would greatly burden the state's criminal justice system: in every case of alleged religious drug use, the state would have to prove use was not pursuant to a sincere religious belief. Ultimately, these consequences would undercut the priority accorded local and national efforts to erradicate illegal drug use.

The fact that some state legislative bodies and Congress have chosen to permit the use of peyote in Native American Church ceremonies does not render Oregon's contrary policy determination illegitimate.[19] Regulatory judgments among legislative bodies may vary for any number of reasons. Accountable political bodies may differently assess the health hazard or law enforcement complications presented by peyote use.[20] For political reasons, some legislative bodies

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[19] *See, e.g.*, N.M. Stat. Anno. § 30-31-6(D) (1986); Iowa Code Ann. § 204.204(8) (West 1987); Tex. Rev. Civ. Stat. Ann. art. 4476-15, § 4.11(a) (Vernon Supp. 1987); 21 C.F.R. § 1307.31 (1986).

[20] There is evidence in the record suggesting that peyote use does not have substantial permanent negative effects on the members of the Native American Church. (*See, e.g.*, Smith Rec., Exh. 7, Aff. of Robert Bergman and Omer C. Stewart). However, the evidence is by no means unanimous. (Smith Rec., Exh. 8, Aff. of Joseph R. Steiner; Black Rec., Exh. 3, Report of Michael F. Hendricks). *See also* discussion *supra* at pp. 15-16. Even religious users of peyote recognize that its effects are unpredictable, sometimes causing terrifying hallucinations. W. LA BARRE, THE PEYOTE CULT, (1969 Ed.) 93-104. Moreover, use of all types of drugs among Native American youngsters, ages 12 to 18, is higher than among other Americans of the same age, Beauvais & LaBoueff, *Drug and Alcohol Abuse Intervention in American Indian Communities*, 20(1) THE INT'L J. OF THE ADDICTIONS, 139, 150-51 (1985), a fact that properly might weigh in a legislature's judgment.

may choose to exempt religious use and to risk the consequences to their state's welfare interests. Under our federal system, states are not required to assess identically the appropriate balance of these interests; they are entitled to respond to their concerns about drug distribution and use on the basis of their varying experiences and resources. Not all states or even most states must enact child labor laws, laws forbidding polygamy or mandatory vaccination requirements for one state's regulations validly to reflect the legislature's judgment of its health and safety interests. The Constitution does not impose on all states the highest common denominator of state regulatory schemes nationwide.

The Oregon legislature's decision to proscribe and heavily sanction all uses of all hallucinogenic drugs in order to protect the health and safety of its citizens must be upheld. Neither this Court nor the state courts should substitute their judgment as to the harmfulness of using peyote for that of the Oregon legislature.[21] *See generally Whalen v. Roe*, 429 U.S. 589 (1977); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). *See also New York v. Ferber*, 458 U.S. 747, 758 (1982) (Court declined to "second-guess" legislative judgment that use of children as subjects of pornographic material harmed children). State legislatures,[22] not the courts, are the proper

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[21] The California Supreme Court made this fundamental error in *People v. Woody*, 61 Cal.2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964). Although the California court recognized that peyote "engenders hallucinatory symptoms similar to those produced in cases of schizophrenia, demenia praecox and paranoia," 61 Cal.2d at 720, 394 P.2d at 817, 40 Cal. Rptr. at 73, the court inexplicably concluded that religious peyote use is harmless. The California court accordingly rejected each of the state's asserted interests as unsupported by evidence. *Id.* 61 Cal.2d at 722-24, 394 P.2d at 818, 40 Cal. Rptr. at 74. Even if the California judicial branch appropriately may override the California legislature's judgments on such an issue, it should not be able to override the judgments of a sister state. Judicially crafted exceptions should be of no weight in assessing the constitutionality of Oregon's criminal prohibition.

[22] The Oregon legislature has delegated responsibility for establishing schedules of controlled substances to the Board of Pharmacy. Or. Rev. Stat.

(Footnote continued on next page)

forum in which to decide whether use of a particular drug is consistent with public health and safety in light of the medical evidence of its side effects and the particular law enforcement concerns and experiences of the individual states.

III. Even if the state must exempt religious use of peyote from the criminal prohibition, the state should not have to reward that conduct with unemployment benefits.

The Court has observed that its decisions extending unemployment benefits to employees who resign or are fired for refusing to work on terms that violate their religious convictions reflect a recognition that government may and sometimes must "accommodate" religious practices. *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 107 S.Ct. at 1051. But the circumstances of these cases are sharply dissimilar from those in *Sherbert*, *Thomas* and *Hobbie*. An award of benefits to these claimants would go beyond the concept of a "reasonable accommodation" of religious beliefs and practices and would confer a special benefit on religion under circumstances that interfere with compelling state interests.

A. The state should not have to award unemployment benefits to religiously motivated misconduct when to do so would conflict with important state policies of general applicability to all other state citizens.

(Footnote continued from previous page)

§ 475.035 (1985). The board has not adopted the federal exemption for peyote use by members of the Native American Church. However, in response to a request by one of the parties to this case, the board will open a hearing on whether to create an exception to Schedule I for religious use of peyote by members of the Native American Church. Minutes, Or. Bd. of Pharm., April 1987. In doing so, the board will "review the scientific knowledge available regarding the substance, its pharmacological effects, patterns of use and misuse, and potential consequences of abuse, and consider the judgment of individuals with training and experience with the substance." Or. Rev. Stat. § 475.035(1) (1985). As counsel to the board, we anticipate that the board may need to seek legal advice on the constitutionality, under the state and federal charters, of an exception for Native American Church users only.

As already discussed, a state unquestionably has the power to regulate and criminalize the distribution, possession and use of dangerous drugs, including peyote. Government's interests in such regulation are compelling. The only arguable point is whether a state's criminal laws can apply to religious use of certain drugs, such as Native American ceremonial use of peyote. As to the general population, a state's criminal laws and policies have full force and effect.

The existence of laws criminalizing and severely punishing peyote use change the analysis, even if claimants are immune from the reach of those laws. The decision in *Sherbert* carefully emphasized that the employee's conduct (her conscientious objection to Saturday work) was not "of a kind within the reach of state legislation." *Sherbert v. Verner*, 374 U.S. at 403. Therefore, because the unemployment compensation scheme accommodated personal motivations for the conduct leading to discharge or resignation, government was similarly required to accommodate religious motivations for the same conduct. *Sherbert v. Verner*, 374 U.S. at 401-02 n. 4 and 409-10. *Accord Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. at 717-20. *See also* Powell, J., concurring in *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 107 S.Ct. at 1052. This result follows because, absent some other governmental interest in regulating the conduct, the *only* basis for denying benefits is government's judgment that religious beliefs do not justify the conduct. As stated in *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, religion should not be singled out as a basis to exclude a person from an "otherwise available public program." 450 U.S. at 716. In short, government cannot deny unemployment compensation under circumstances that evidence a special hostility or intolerance for religious belief.

A different result should follow where the conduct is within the state's general regulatory authority. Cast in the context of this litigation, the state regulates and controls peyote for indisputably strong reasons relating to citizen welfare and public order. Wholly apart from the question whether these claimants can be prosecuted and punished for their use of peyote, the state at the very least has an interest in not encouraging, appearing to sanction or otherwise sponsoring an activity that violates its otherwise valid criminal law policies. It is one thing to bar the state from punishing religious drug use; it is an altogether different proposition to require the state specially to subsidize it. *Cf. Harris v. McRae*, 448 U.S. 297 (1980) (state not required to fund abortions that are not funded under Medicaid provisions even though claimants sought abortions for religious reasons). The state's unwillingness to override its unemployment statutes and award benefits to employees who engage in job-related misconduct by using peyote reflects consistency with the state regulatory scheme governing the general population, not intolerance of religion.

An award of benefits to these claimants therefore would raise the establishment problem not present in *Sherbert* and *Thomas*. Under the reasoning of the majority in those cases, the Establishment Clause was not triggered because the conduct was not otherwise subject to state regulatory authority. But here, the state regulates peyote use for religiously neutral and compelling reasons. No state citizen, other than perhaps members of certain religions, lawfully may use peyote. To override the general policy regarding peyote use by constitutionally requiring that claimants be deemed eligible for unemployment benefits would be to provide special treatment for religious practices rather than a guarantee of government neutrality.

As a result, in these cases, the rationale underlying *Sherbert* and *Thomas* gives way altogether, and their holdings are inapposite. There is no logical or policy sense to support an analysis that dictates that members of the public at large may

be imprisoned for using peyote, while adherents to a particular religious faith are entitled to unemployment benefits when they are fired for violating an employer's express prohibition of peyote use. The theme in *Sherbert* and *Thomas* is that claimants should not be *disadvantaged* by virtue of their religious convictions. Here the claimants turn that theme on its head and seek to be advantaged. The Free Exercise Clause does not mandate that claimants receive such special treatment; indeed, the Establishment Clause should forbid it.

B. The state has a compelling interest in not awarding benefits for misconduct that actively and directly undermines the employer's interests.

This case differs from *Sherbert* and *Thomas* in a second important way: the employees' misconduct did not consist of merely the passive failure to comply with the employer's work-related rules; rather, both of these employees insisted on actively violating those rules in a way that threatened directly to undermine the employer's very purpose—its efforts to rehabilitate drug-dependent clients. This distinction, too, is decisive.

In the prior cases decided by this Court, the employees passively refused to engage in conduct required by their employer that violated their religious beliefs. In *Sherbert*, the claimant refused to work on Saturdays in good faith observance of her religious beliefs. Her refusal caused her to be fired. In *Thomas*, the claimant refused to work on armaments, again in good faith observance of his religious beliefs. He quit. In *Hobbie*, the claimant converted to religious beliefs that required her not to work on Saturdays and, upon her refusal to work, she was fired. Here, the claimants did more: they knew the terms of their employer's policy; they professed their willingness to abide by them; they directly violated their employer's policy by using drugs while maintaining their roles as drug counselors; they refused to resign, refused assistance in obtaining alternative employment, and refused to be assessed for drug dependency so they could continue their jobs.

This conduct actively interfered with the employer's legitimate interests in a way that directly threatened to undermine the employer's business objectives. ADAPT is a drug and alcohol counseling organization. Its treatment philosophy is that effective treatment requires total abstinence. It requires its counselors, many of whom like claimants are former addicts, to abide by that policy. ADAPT imposes this policy to ensure that its counselors are proper role models as well as effective counselors.

When claimants insisted on violating their prior agreement rather than resign from their employment, they did not merely adhere to their religious beliefs, they also sacrificed their employer's legitimate interests in the process. This distinguishes *Sherbert* and *Thomas*. *Sherbert* would be analogous if Sherbert, rather than announce her unwillingness to work Saturdays and quit or be fired, had failed weekend after weekend to appear for work, seriously disrupting the employer's scheduling and productivity. *Thomas* would be analogous if Thomas had continued his employment and, rather than refuse to work on armaments, had sabotaged their construction.

This Court has suggested that a state is not required to award unemployment benefits for religiously motivated conduct where the integrity of the statutory scheme would be threatened; the Court has not, however, found that interest sufficiently implicated on the facts of the prior cases. *Sherbert v. Verner*, 374 U.S. at 406-07; *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. at 718-19. But active misconduct of the kind involved in these cases squarely presents that danger.[23] Employers are unwill-

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[23] Other hypothetical examples of active rather than passive misconduct

(Footnote continued on next page)

ing participants in the unemployment benefit system. Their participation in the Oregon scheme is mandatory as are the taxes they must pay to support their participation. Or. Rev. Stat. § 657.505 (1985). Their tax rate varies with the level of successful claims brought by their employees. Or. Rev. Stat. §§ 657.430; 657.471 (1985). The cost of each unemployment benefit award is thus borne in part by the employer. By predicating awards on notions of fault, such as lack of misconduct or good cause for quitting, Oregon's unemployment compensation statutes, like those of most states, ensure that the scheme operates fairly to protect the financial interests of employers and employees alike.

A reasonable "accommodation" of religion does not require a state to award benefits to employees who insist on working against an employer's interests in the process of religious observance. Claimants Black and Smith did not choose a course of action that minimized the injury to their employer's interests without violating their religious beliefs. Yet such an option existed: each claimant could have refused to work on the employer's terms and could have resigned when the employer was unwilling to alter the drug use policy. Instead, claimants exercised their religious beliefs in a manner that directly threatened the welfare of the

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highlight the distinction. A reasonable accommodation of religion should not require benefits to be paid to a public or private school teacher whose religion commands discipline in the form of physical cruelty and who inflicts such cruelty contrary to school policy rather than resign or be fired for refusing to teach on those terms. *Cf. State ex rel. Juv. Dept. v. Tucker*, 83 Or. App. 330, 731 P.2d 1051 (1987) (involving parents who beat and tortured their children pursuant to religious leader's directives); *Hollon v. Pierce*, 257 Cal. App.2d 468, 64 Cal. Rptr. 808 (1967) (challenging dismissal of school bus driver whose religious beliefs professed violence, and included references to school burning and death of school children). The same should be true of an employee who insists on religious proselytizing in the workplace to the neglect of his or her responsibilities and the disruption of the work of others. Accommodation of that employee's sincere religious beliefs should not extend to payment of benefits when the employee has actively interfered with the employer's interests rather than resign or refuse to work on terms that violate his or her beliefs.

employer's drug-dependent clients. To award benefits in such an instance unquestionably is unfair to this employer and goes beyond the notion of a reasonable "accommodation" of religion.

A system that operates in a way that is neither rational nor fair undermines public respect for and confidence in the unemployment compensation laws. That, however, is the inevitable result if, as here, employees can violate express agreements to abide by the employer's policies, refuse alternative employment assistance and second chances, engage in conduct that is both unlawful and destructive to the employer's interests, and nevertheless receive unemployment benefits as a reward. The state's compelling interest in the integrity of the statutory scheme is directly and unduly compromised by a result that rewards active misconduct of this kind. Accordingly, claimants are not entitled to benefits.

CONCLUSION

The decision of the Oregon Supreme Court, holding that the first amendment entitles claimants to unemployment compensation benefits in spite of their work-related misconduct, should be reversed. The case should be remanded to the Oregon Supreme Court with instructions that it vacate its judgment and reinstate the Employment Appeals Board's order denying benefits.

Respectfully submitted,
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Supreme Court, U.S.
FILED
JUL 29 1987
JOSEPH F. SPANIOL, JR.
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No. 86-946 ⑤
No. 86-947 ⑤

In The
Supreme Court of the United States
October Term, 1987

EMPLOYMENT DIVISION, DEPARTMENT OF
HUMAN RESOURCES of the STATE OF OREGON,
RAY THORNE, Administrator,

Petitioner,

v.

ALFRED L. SMITH (No. 86-946) and
GALEN W. BLACK (No. 86-947),

Respondents.

**On Writ of Certiorari to the Supreme Court
of the State of Oregon**

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QUESTIONS PRESENTED

Did the Oregon Supreme Court correctly hold that the state's interest in the financial stability of its unemployment insurance fund—the only interest the Oregon court found to be pertinent under state law—was insufficient to outweigh the free exercise rights of two employees who were discharged for religiously motivated conduct that conflicted with a condition of their employment?

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STATEMENT OF THE CASE

ADAPT hired Galen Black in September 1982 as a part-time resident assistant because of his personal experience with substance abuse, which ended in February 1982. Within nine months he was twice promoted, and had earned a full-time counselor position. (Black, Tr. 7-8; 18-19; Exh. 3.)

Mr. Black's job responsibilties included providing in-patients with transportation to weekly Native American sweat ceremonies, an integral part of the agency's cross-cultural treatment plan. A non-Indian, he began participating in the sweats to better understand his clients' spirituality. That exposure led him to read about the subject, attend pow wow and sun dance ceremonies outside of work and, ultimately, choose the Native American religion as his own. (Black, Tr. 29; 33-34; 42-43.)

On Saturday, September 10, 1983, Mr. Black went to his first Native American Church teepee ceremony at the Sweathouse Lodge, an American Indian alcohol and drug rehabilitation program in Cascadia, Oregon. (Black, Tr. 13-14.) During the course of the ceremony, which lasted from sundown to sunrise, he took a small amount of peyote in communion as a sacrament. It is undisputed that the amount taken was insufficient to produce any hallucinogenic effect and that Mr. Black's conduct was motivated by sincere religious beliefs. He was not scheduled to return to work until the following Monday. (Black, Tr. at 13; 26; 28-29; 34-35.)

At that time, ADAPT's written personnel policies proscribed "misuse" and "abuse" of alcohol and/or other mind altering substances. (Black, Exh. 2.) Under the employer's total abstinence treatment philosophy, it was understood that any social or recreational use of intoxicants by a recovering individual was considered misuse/abuse. (Black, Tr. 23; 27.) Prescribed medications were allowed, however, and there existed no written or unwritten policy concerning the religious use of alcohol or drugs. (Black, Tr. at 33; Exh. 3, p. 1.)

On September 16, 1983 Mr. Black's attendance at the teepee ceremony came to the attention of ADAPT's executive director, John Gardin. Mr. Black acknowledged he had had peyote on that occasion. Mr. Gardin stated the decision showed poor judgment and advised Mr. Black that he would be contacted about further disciplinary action. (Black, Tr. 13-14; Exh. 4.) Three days later the employer suspended Mr. Black without pay and referred him for an evaluation. (Black, Exh. 1, page 2; Exh. 5.)

Al Smith, then 64 years old, is a Klamath Indian who was hired by ADAPT in August 1982 as a state-certified Alcohol and Drug Abuse Evaluation Specialist. He had had a drinking problem in his youth, but had not touched alcohol since January 1957. In 1971, after 14 years of volunteer work as a member of Alcoholics Anonymous, he became a professional counselor and worked continuously in that capacity ever since. He joined the Native American Church around 1978, while employed in the southwestern United States with the American Native Commission on Alcohol and Alcohol Abuse. (Smith, Tr. 43-47.)

Mr. Smith was the sole Native American employed by ADAPT. Part of the reason he had been hired was to run the sweat lodge ceremony. (Smith, Tr. 6.) Mr. Gardin was well aware of how important Indian culture and religion were to Mr. Smith, and respected his right to participate in his religion and his culture. The agency director had not previously talked to Mr. Smith about the sacramental use of peyote. After suspending Mr. Black on September 19, 1983, however, Mr. Gardin realized the need to specifically inform Mr. Smith that he considered religious use of peyote to be "misuse/abuse" under the agency's personnel policy because the then existing policy was "insignificant, inadequate." (Smith, Tr. 20; 28; 31.)

On October 3, 1983, ADAPT's Board of Directors met to discuss the situation which had arisen concerning Mr. Black. A motion to "support the direction that John Gardin ha[d] been taking regarding the basic policies already established" failed. The Board agreed, however, to give Mr. Black the choice of treatment with the possibility of continued employment upon satisfactory completion, or termination. The Board further decided to "formulate policies in writing around these issues." (Black, Exh. 7.)

Mr. Black refused the option of accepting residential alcoholism treatment at his own expense while on leave without pay, on grounds he was not in relapse, and was terminated for violating the employer's personnel policy.[1] (Black, Tr. 21; Exh. 1.)

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[1] The social worker who evaluated Mr. Black in September 1983 determined Mr. Black had taken no mind altering chemicals since February 7, 1982 outside of his single religious ingestion of peyote, and was "not sure" Mr. Black needed inpatient treatment. (Black, Exh. 3.) Claimant remained drug and alcohol free at the time of the December 5, 1983 unemployment hearing. (Black, Tr. 48.)

On December 5, 1983 ADAPT adopted a policy statement that use of an illegal drug, or any use of alcohol by a recovering staff member "in *any* situation," was grounds for termination. Use of prescribed mood altering medications continued to be permissible, however. (Smith, Exh. 2; Tr. 28.)

Mr. Smith testified he felt intimidated by the employer's refusal to allow him to participate in his communion because his wife and child were dependent upon him for support, so he couldn't afford to lose his job. When some Native Americans requested his attendance at a meeting, however, he decided he had no choice but to follow his conscience. (Smith, Tr. 47-49.)

On Friday, March 2, 1984, Mr. Smith informed Mr. Gardin he had received a special invitation to attend a teepee ceremony that weekend and "needed to go to church." He also disclosed his intention to take communion, as he considered the ingestion of peyote in communion to be "the very heart" of the teepee ceremony. Mr. Gardin responded that Mr. Smith had his support in attending the ceremony, "but that if he did ingest peyote during the ceremony he would be expected to resign or be terminated immediately." (Smith, Exh. 4; Tr. 12, 49.)[2]

When Mr. Smith returned to work the next Monday, he told Mr. Gardin he had followed through with his

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[2] In September 1983, Mr. Gardin told Mr. Smith he would help him find another place of employ if Mr. Smith didn't think he could live with the way the agency was handling Mr. Black's case. He mentioned no specific job opportunities, however, and failed to renew his nebulous offer in March 1984, when Mr. Smith did decide he could no longer give up his religion to appease this employer. (Smith, Tr. 20.)

planned religious activities. Asked whether he wished to resign, he stated "no," and was fired. As an afterthought, Mr. Gardin offered Mr. Smith the option of participating in the employee assistance plan. Mr. Smith declined because he felt there was nothing wrong with him. To the contrary, he believed his religious practices made him a better counselor. (Smith, Tr. 13; 37-39; 44; 50; Exh. 1; 5.)

The employer had no complaint about the job performance of either of these employees. (Black, Exh. 6; Smith, Tr. 22.) Both were terminated solely for their sacramental use of peyote. (Black, Exh. 1; Smith, Exh. 1.) Neither state law nor state guidelines required the removal of a recovering alcoholic from a counselor position for "any" use of alcohol or drugs. (Black, Tr. 25.)

The *Smith* record includes affidavits of noted experts on the Native American Church. These document that Mr. Smith is a sincere member of the Church, the teepee ceremony he attended March 3, 1984 was a *bona fide* church ceremony and, further, that peyote "is itself a deity and an object of worship" for Native American Church members which is "central and essential to the teepee ceremony" and such use is legal under federal law.[3] (Smith, Exh. 7.)

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[3] Petitioner has conceded that claimants' religious conduct is legal under federal law. (Black, Brief of the Employment Division before the Oregon Court of Appeals at 16-17; Smith, Brief of the Employment Division before the Oregon Court of Appeals at 16.)

SUMMARY OF ARGUMENT

As in *Sherbert v. Verner*, 374 U.S. 398 (1963), *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707 (1981), and *Hobbie v. Unemployment Appeals Comm'n. of Fla.*, 107 S.Ct. 1046 (1987), claimants here faced an irreconcilable conflict between their religious practices and the conditions of their employment, and adhered to their beliefs at the cost of their jobs. The religious conduct of Smith and Black is not inconsistent with employment in general. Thus, under *Sherbert, Thomas* and *Hobbie*, the State may not discriminate against them for exercising their First Amendment rights by denying them unemployment benefits.

The Employment Division argues these cases are distinguishable from this Court's established rule because claimant's religious conduct is illegal, and the state's compelling interest in enforcement of its criminal law overrides respondents' free exercise rights. The Oregon appellate courts expressly determined, however, that under state law, the legality of claimants' conduct was not a factor pertinent to the assessment of their eligibility for unemployment compensation benefits.

If the state criminal code may properly be considered, there is no evidence in this record to support a conclusion that claimants' personal conduct was illegal or that their religious practices are not constitutionally protected from criminal sanction. Petitioner's efforts to taint claimants with the stigma of criminality cannot serve to make this case something it is not. This is a civil proceeding, and claimants have never been charged with nor convicted of any crime.

Further, a review of the history of the Oregon unemployment benefits statute, and its construction by the judiciary, reveals that individuals whose work separations result from analogous nonreligious conduct are entitled to benefits. Thus, imposition of the penalty of disqualification here would evidence hostility toward and discrimination against religion, rather than the reverse.

Accordingly, this Court's decisions in *Sherbert, Thomas* and *Hobbie* compel affirmance of the Oregon Supreme Court's decision finding claimants entitled to unemployment compensation. A contrary conclusion would require this Court: to reverse a state court decision on an issue of state law; to abdicate its role as final arbiter of constitutional rights; to overrule *Wisconsin v. Yoder,* 406 U.S. 205 (1972); to ignore the Supremacy Clause, Article VI, Section 2 of the Constitution; to violate well established constitutional precedent in the areas of due process and religious freedom; and to condone petitioner's procedurally abhorrent attempt to seek a ruling from this Court on new "evidence" it chose not to submit for consideration by the appellate courts in its own state.

ARGUMENT

I. These Cases Are Not Materially Distinguishable From Sherbert, Thomas and Hobbie.

In *Sherbert v. Verner,* this Court clarified that the free exercise clause protects sincere religiously motivated conduct from indirect as well as direct restriction by a state, unless the state is able to prove that the statute imposing the burden serves a compelling interest which cannot otherwise be effectuated.

There, a millworker was fired after her employer changed to a six-day work week because, as a member of the Seventh Day Adventist Church, she could not work Saturdays without violating a basic tenet of her faith. Unable to secure five-day work at any other local mill, Ms. Sherbert applied for unemployment compensation but was found ineligible on grounds she had failed to accept suitable work without good cause.

This Court observed that, although the state did not directly require Ms. Sherbert to forego her religious practices to accept work, the denial of benefits indirectly functioned to coerce that very result by, in effect, fining individuals whose unemployment was attributable to a conflict between strongly held religious convictions and conditions of particular jobs. Thus, Ms. Sherbert's free exercise rights were substantially burdened by the state court's determination that employment which imposes conditions inconsistent with a mandate of one's faith is "suitable work" within the meaning of the unemployment compensation statute.

That burden was not outweighed by the state's speculative concern about the "possibility that the filing of fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work might not only dilute the unemployment compensation fund but also hinder the scheduling by employers of necessary Saturday work." *Sherbert, supra* at 407. Ms. Sherbert's religious convictions did not serve to make her a "non-productive member of society," nor would allowance of an exemption render the "entire statutory scheme unworkable." *Id.* at 409-410. Accordingly this Court found that under the free religious exercise guarantees of the First and Fourteenth Amendments, Ms. Sherbert was entitled to receive unemployment compensation.

In *Thomas v. Review Board,* a Jehovah's Witness who believed his faith forbade him from working directly in weapons production quit his job when his employer closed the industrial sheet metal department in which he had initially been hired to work and transferred him to a division that fabricated turrets for military tanks. The employer had no nonweapons work available. This Court again reversed a state court's denial of unemployment benefits on First Amendment grounds, holding it immaterial that Mr. Thomas' religious beliefs were not shared by all members of his church. The nature of the work separation, resignation rather than discharge, was also deemed unimportant: "In both cases, the termination flowed from the fact that the employment, once acceptable, became religiously objectionable because of changed conditions." *Thomas, supra* at 718. The state's asserted interest in avoiding "widespread unemployment and the consequent burden on the fund resulting if people were permitted to leave jobs for 'personal reasons' . . . and to avoid a detailed probing by employers into job applicants' religious beliefs" was rejected as insufficiently compelling to justify the burden imposed upon religious liberty, and without evidentiary support in the record. *Id.* at 719.

The constitutional principles articulated in *Sherbert* and reaffirmed in *Thomas* were again endorsed in *Hobbie,* where the Court added that it is of no moment whether changed conditions which render employment religiously objectionable result from a worker's conversion to a new faith, as opposed to an action on the part of the employer.

The cases at bar fall squarely within the rule this Court has consistently applied in unemployment cases over the past twenty-four years. Further, no state interest enforced in the eligibility provisions of the Oregon unemployment statute justifies a departure from existing precedent.

Galen Black, like Ms. Hobbie, converted to a new faith after hire.

Al Smith, like Mr. Thomas, was hired with the employer's knowledge of his religious affiliation and accepted the job in good faith. When Mr. Smith accepted the job, ADAPT had no written or unwritten policies concerning the religious use of drugs or alcohol. The conflict between his religion and his employment did not come to light until the controversy arose surrounding Mr. Black since Mr. Smith had not attended any teepee ceremonies after moving to Roseburg from the Southwest. He was unaware ADAPT would refuse to accommodate his religious conduct, a known exception to the total abstinence treatment philosophy, until the Board took its stand around Mr. Black's sacramental use of peyote.

The Oregon Supreme Court found that: the Native American Church is a recognized religion; peyote is used by the Church as a sacrament; respondents are members of the Church; and their religious beliefs concerning the ingestion of peyote are sincerely held. *Smith v. Employment Division*, 301 Or. 209, 721 P.2d 445, 450-451 (1986); *Black v. Employment Division*, 301 Or. 221, 721 P.2d 451, 453-454 (1986). On the authority of *Sherbert* and *Thomas*, the Court next determined that the denial of unemployment compensation imposed a significant burden on respondents' religious freedom. Since the Oregon Employment Division had failed to show "that the financial stability of the [unemployment insurance] fund will be imperiled by claimants applying for religious exemptions" if these claimants received benefits, the court concluded that respondents' discharges for violation of a personnel rule could not, consistently with the federal First Amendment free religious exercise guarantee, be deemed disqualifying misconduct. *Smith, supra*, 721 P.2d at 451.

The Employment Division here urges its interest in denying benefits is overriding because the state has a compelling interest in proscribing the use of dangerous drugs.[4] Both the Oregon Court of Appeals and the Oregon Supreme Court ruled, however, that as a matter of state law the legality of the conduct which brought about claimants' discharges was irrelevant to the assessment of their benefit eligibility. Indeed, the Employment Division conceded below that "the commission of an illegal act or conviction of a crime is not, in and of itself, grounds for disqualification from unemployment benefits."[5]

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[4] At the inception of these proceedings, it suited petitioner's purpose to argue that the legality of Mr. Black's religious conduct was irrelevant. (Black, Brief of the Employment Division before the Oregon Court of Appeals at 18.)

[5] Memorandum of Petitioner on Review Employment Division Responding to Questions of the [Oregon Supreme] Court at 17.

The Employment Division has failed to offer authority in support of its unorthodox contention that it may nonetheless withhold unemployment compensation as a civil penalty for conduct which is merely alleged to be illegal. Instead, it complains that "[t]he Oregon court offered no authority, principle or rationale for the limitation it placed on its assessment of the state interests." (Br. at 10.) The state court's authority for the limitation, however, is unambiguously expressed in the statute at issue in this case. The Oregon Legislature has clearly delineated limited circumstances, consistent with the due process clause of the Fourteenth Amendment, under which the Employment Division may consider the legality of a claimant's conduct, and the Oregon judiciary determined those circumstances were not present in these cases. (*See:* Argument III.A., *infra.*)

Petitioner's additional claim, that these cases differ from *Sherbert, Thomas* and *Hobbie,* because Mr. Smith and Mr. Black insisted on "actively undermining their employer's interest rather than resigning from work or refusing to work on terms that offended their religious beliefs," Br. at 11, elevates semantics over substance.[6] The religious conduct of these claimants was, if anything, less disruptive of the employer's business interests than was the refusal of Ms. Sherbert and Ms. Hobbie to work on Saturdays or Mr. Thomas' refusal to work in weapons production.

The decisions to terminate claimants rested solely upon ADAPT's ethnocentric perception that respondents' private, off-duty religious practices would make them unsuitable role models for the agency's clients, a perception it has since abandoned. In that regard, it may be judicially noted that on March 31, 1986 the employer agreed "[t]o revise or interpret hereafter by resolution all practices of ADAPT to eliminate any discipline against members of the Native American Church for the non-drug sacramental use of peyote during a bona fide ceremony of the Native American Church."[7] In any event, claimants were fired forthwith. Thus, no interest of the employer could be said to have come to harm.

The legitimacy of Ms. Sherbert's and Ms. Hobbie's employers' need for Saturday workers, and of Mr. Thomas' employer's need for individuals willing to produce weapons is beyond question. ADAPT's claimed interests, on the other hand, appear wholly arbitrary if not illegal. Thus, petitioner's contention that respondents "did not merely adhere to their religious beliefs, they also sacrificed their employer's legitimate interests in the process," Br. at 26, while Ms. Sherbert, Mr. Thomas and Ms. Hobbie somehow did not, is truly inexplicable.

II. The Record In These Cases Fails To Establish Claimants' Religious Conduct Is Criminal.

It is fundamental that a state's interest in enforcing legislation challenged as overreaching must be found in the statute that creates the burden. Thus, as the Oregon courts found, the Employment Division is without standing here to assert any interest in enforcement of the state criminal law.[8] *Black,* 75 Or. App. 735, 707 P.2d 1274 at 1280 (1985); *Smith, supra,* 721 P.2d at 450.

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[6] The Employment Division has until now withheld mention of this allegedly "compelling" interest.

[7] *EEOC v. ADAPT*, Civil No. C85-6139-E (U.S. District Court for Oregon, at Eugene), Consent Decree filed March 4, 1986. App. 3.

If the legality of claimant's religious conduct could be deemed a consideration material to their eligibility for unemployment benefits, however, there is no evidence in this record that provides a basis for a conclusion they could be charged with or found guilty of any crime. That reality precisely illustrates the constitutional infirmity of petitioner's notion it may use Employment Division law to effectuate state interests which the Legislature did not intend to be served by enactment of Oregon's unemployment compensation statute.

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[8] If petitioner is truly desirous of tacking together compelling interests of the state beyond those expressed in its own statute, it might question the legality of this employer's conduct and claim an interest in effectuating Oregon's policy to protect workers from discrimination because of religion, Or.Rev.Stat. 659.020, or handicap (which includes being "regarded as having an impairment"), Or.Rev.Stat. 659.400. The Employment Division could also take into account the efforts the Oregon Legislature has made to safeguard the free religious exercise rights of its citizenry. Or.Rev.Stat. 339.420 (Release from school to attend religious instruction); Or.Rev.Stat. 433.306 (religious exemption from state requirement that Vitamin K be administered to all newborns); Or.Rev.Stat. 441.680 (exemption from Patient Neglect statutes for "treatment solely by spiritual means through prayer"); Or.Rev.Stat. 471.335, 471.405(2), 471.430 (exemptions of sacramental wine from regulation by the Oregon Liquor Control Commission). It might additionally weigh the state's interest in protecting individuals who have committed crimes from civil penalty. Or.Rev.Stat. 670.280 (conviction of a crime in and of itself, may not provide grounds for denial, suspension or revocation of an occupational license).

A. The Oregon Legislature Has Chosen Not To Criminalize Drug Use, And Possession In The Course Of Use Does Not Subject An Individual To Criminal Sanction For The Crime Of "Possession."

At page 11 of its brief, the Employment Division represents that "Possessing or using peyote is a Class B felony under Oregon Law, punishable by a maximum sentence of ten years imprisonment," citing Or.Rev.Stat. §§ 475.992(4)(a) and 161.605(2) (1985). A dispassionate examination of the law, however, fails to disclose any crime with which these claimants could be charged.

Contrary to petitioner's assertions, Or.Rev.Stat. § 475.992(4)(a) proscribes only the possession of Schedule I controlled substances, not use. It states in full:

> It is unlawful for any person knowingly or intentionally to possess a controlled substance unless the substance was obtained directly from or pursuant to, a valid prescription or order of a practitioner while acting in the course of his professional practice, or except as otherwise authorized by Or.Rev.Stat. 475.005 to 475.285 and 475.991 to 475.995. Any person who violates this subsection with respect to:
>
> (a) A controlled substance in Schedule I, is guilty of a Class B felony.

The ten year maximum sentence is set forth in Or.Rev. Stat. 161.605(2).

In 1977 the Oregon Court of Appeals held in *State v. Downes,* 31 Or. App. 1183, 572 P.2d 1328, that mere injection or ingestion of a drug in the course of use could not subject the user to penalty for illegal possession. There, the defendant was convicted of both criminal activity in drugs by possession and criminal use of drugs based upon a single incident of use. Reversing the conviction for criminal activity in drugs by possession, the court stated:

> If we were to accept the state's theory, everyone guilty of criminal use of drugs under ORS 167.217, subject to a maximum term of one-year imprisonment, would also be guilty of criminal activity in drugs under ORS 167.207, subject to a maximum term of imprisonment of ten years. Not only would there be no necessity for ORS 167.217, but the apparent legislative scheme of treating illegal use as a less serious offense than illegal possession would be thwarted.

Id., 572 P.2d at 1330.

That same year, the Oregon Legislature totally decriminalized drug use when it repealed its existing drug law and replaced it with the Uniform Controlled Substances Act (Or.Rev.Stat. 475.005 *et seq.*), which nowhere proscribes use. Since then, the State's sole remedy for problems relating to individual drug use is treatment, not incarceration. *See*: Or.Rev.Stat. 430.250, *et seq.*

In fact, it is illegal in Oregon to impose any penalty for drug use in and of itself. In that regard, Or.Rev.Stat. 430.325 provides:

> *Prohibition on local governments as to certain crimes.*
>
> (1) A political subdivision in this state shall not adopt or enforce any local law that makes any of the following an offense, a violation or the subject of criminal or civil penalties or sanctions of any kind:
>
> * * * * *
>
> (e) Using or being under the influence of controlled substances.

The Legislature's purpose in proscribing the imposition of criminal or civil sanctions for drug use is founded in its policy, adopted in 1973, to treat drug dependency as an illness. *See*: Or.Rev.Stat. 430.250. The state's incentive to repeal all laws penalizing using or being under the influence of intoxicants was reinforced by the 1974 enactment of 42 U.S.C. § 4574, which provided for the federal funding of state alcoholism and intoxication treatment programs. Subsection (b)(1) of that legislation provided that states which had not repealed those portions of their criminal statutes and ordinances which included intoxication as a material part of the offense could not qualify from grants. *See*: Opinion of the Oregon Attorney General, Vol. 37, No. 4 at 647-652 (1975).

The crime of possession is defined under state law as "to have physical possession or otherwise to exercise dominion or control over property." Or.Rev.Stat. 161.015 (8). Claimants here did nothing more than ingest a nominal amount of peyote, provided to them by a spiritual leader of the Native American Church, in the course of a *bona fide* religious ceremony. Thus, the Employment Division's underlying premise is clearly false: respondents' personal religious conduct falls within neither the letter nor the spirit of Oregon's criminal code.

B. The State Has Failed To Present Evidence Sufficient To Outweigh The Constitutional Right Of The Native American Church To Conduct Teepee Ceremonies.

1. The Historic Federal Protection Accorded To The Practice Of Peyotism Is Intended To Embody A Constitutional Guarantee.

Throughout the history of this country, the United States has consistently protected the practice of peyotism from intentional and inadvertent infringement. In that regard, federal anti-peyote measures proposed in 1897, 1906, 1915, 1917, 1918, 1919, 1921, 1922, 1924, 1926 and 1937 were all rejected.[9] The Drug Abuse Control Amendments of 1965, 79 Stat. 226 § 3(a), originally included peyote as a controlled substance, together with an exemption "insofar as its use is in connection with the ceremonies of a certified religious organization," III Cong. Rec. 14608 (1965), but the Senate committee deleted peyote and its exemption from the statute based upon the determination that only barbituates and amphetamines should be subject to the bill's control. The Secretary of Health, Education and Welfare (HEW) was entrusted with responsibility for the inclusion of additional classes of drugs on a case by case basis, following scientific review and advisory group input. III Cong. Rec. 14609-11 (1965).

Peyote and mescaline were subsequently added to HEW's Schedule I by administrative regulation, but religious use was specifically exempted. 31 Fed. Reg. 565, 4679 (1966). Schedule I was enacted into law with passage of the Controlled Substances Act of 1970, 21 U.S.C. § 812(c). The inclusion of peyote therein was conditioned upon the Bureau of Narcotics and Dangerous Drugs' guarantee that its recognized religious use would continue to be protected. That exemption was formalized by regulation promulgated on April 24, 1971, 36 Fed. Reg. 7776, 7802 (1971). Currently codified at 21 C.F.R. § 1307.31, it now reads: "The listing of peyote as a controlled substance in Schedule I does not apply to the nondrug use of peyote in a bona fide religious ceremonies of the Native American Church, and members of the Native American Church so using peyote are exempt from registration." The Church was listed by name because the Bureau considered it "to be sui generis. The history and tradition of the church is such that there is no question but that they regard it as a deity." Drug Abuse Control Amendments of 1970, *Hearings Before the Subcommittee on Public Health & Welfare of the Committee on Interstate and Foreign Commerce, House of Representatives,* 91st Cong., 2d Sess. 117-18 (1970).

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[9] W. LaBarre, *The Peyote Cult* (Shocken Books, 4th ed. 1975) at pp. 29, 224.

The legislative history of the exemption is discussed at length in *Toledo v. Nebel-Sysco, Inc.,* 654 F.Supp. 483, 490 (D.N.M. 1986) and *Native American Church of New York v. U.S.,* 468 F.Supp. 1247, 1249-51 (S.D.N.Y. 1979), *aff'd* 633 F.2d 205 (2nd Cir. 1980). From that history, which includes specific reference to the California Supreme Court's *en banc* decision in *People v. Woody,* 40 Cal. Rptr. 69, 394 P.2d 813 (1964) and *Arizona v. Attakai,* Criminal No. 4098, Coconino County, July 26, 1960, wherein both courts found the state controlled substance statutes could not constitutionally be applied to Native American Church members, it is evident 21 C.F.R. § 1307.31 was intended to embody a First Amendment free exercise guarantee.

2. Failure To Exempt Sacramental Use of Peyote In The Native American Church From Criminal Sanction Is Contrary To This Court's Decision In Wisconsin v. Yoder.

Under the Supremacy Clause, Article VI, Sec. 2 of the United States Constitution, the Free Exercise rights guaranteed under the First Amendment, which the Fourteenth Amendment obligates the States to honor,[10] carry with them a presumption of freedom from both intentional and inadvertent state restraint. Thus, in ***Wisconsin v. Yoder***, 406 U.S. 205 at 220 (1972), where Amish parents were found exempt from the state's compulsory school attendance law once their children completed the eighth grade, this Court clearly recognized that, although an individual's religiously grounded conduct must often yield to the common good there are, nonetheless, "areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability." Application of the principles set forth in ***Wisconsin v. Yoder*** to this case compels the conclusion that claimants' religious practices are fully entitled to constitutional protection.

In that regard, the practice of peyotism predates governmental regulation by centuries and thus clearly qualifies as a religion by any definition. Further, there can be no dispute that disallowance of an exemption from state criminal drug laws would result in the extinction of the Native American Church. Finally, although the state's interest in regulating controlled substances is admittedly vital, there is no evidence that application of the statute to Native American Church members would further the purpose the statute is intended to serve. Religious use of peyote is confined to the ritual. It has not been shown to be dangerous to communicants; rather, the reverse appears to be the case.[11] As the California Supreme Court noted in *People v. Woody, supra,* 394 P.2d at 818, fn. 3: "Most anthropological authorities hold Peyotism to be a positive, rather than a negative, force in the lives of its adherents. Since the Church forbids the use of alcohol and has adopted many of the moral precepts of Christianity, these authorities conclude that members observe higher standards than nonmembers. *See,* also: *Whitehorn v. State,* 561 P.2d 539 (Okl. 1977); *State v. Whittingham,* 9 Ariz. App. 27, 504 P.2d 950 (1973). Nor can it be proven that allowance of the exemption would risk diversion of peyote for non-religious use: it is worshipped as a sacred object, and kept with the Church.[12]

The state, for the first time on appeal, offers as objection to allowance of the exemption an arsenal of speculative fears. As was the case in *Sherbert,* 374 U.S. at 407, however, it must be said:

> that possibility is not apposite here because no such objection appears to have been made before the South Carolina Supreme Court, and we are unwilling to assess the importance of an asserted state interest without the views of the state court. Nor, if the contention had been made below, would the record appear to sustain it.

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[10] *Cantwell v. Connecticut,* 310 U.S. 296 (1940).

[11] *See:* Albaugh and Anderson, "Peyote in the Treatment of Alcoholism Among American Indians." *Am J Psychiatry,* 131:11 (November 1974) at 1247-1251; Pascarosa and Futterman, "Ethnopsychedelic Therapy." *Journal of Psychedelic Drugs,* Vol. 8 (No. 3) (Jul-Sep, 1976) at 215-221. (There it was documented at p. 220 that "A chromosomal study of Indians with a lifelong history, and a 1,600-year cultural tradition of peyote ingestion, failed to reveal any increase in abnormalities.")

[12] Wachtel, "Peyotism." *American Indian Journal,* 2-7, March 1981.

In that regard, contrary to petitioner's suggestion at page 21 of its brief, the Oregon Legislature never determined that religious use of peyote presented the same risk to Native American Church members as did its nonreligious use by the public in general. The Legislature delegated responsibility for such determination to the Oregon Board of Pharmacy in 1977. When the issue was recently brought to its attention, for the first time, the Board unanimously decided to accept the language of 21 C.F.R. 1307.31 for a proposed rule.[13]

Further, the state's claim that allowance of the exemption would "cripple" enforcement of its drug laws is akin to claiming the insanity defense should be abolished because police have no way of knowing whether the accused is insane. Or.Rev.Stat. 475.235 specifically provides: "The burden of proof of any exemption or exception is upon the person claiming it." Indeed, the very cases upon which petitioner relies to prove its point demonstrate the adeptness of the judicial system in identifying spurious claims and limiting constitutional protection to religious conduct which does not conflict with the state's interest in protecting its citizens from the dangers of drug abuse.

The Employment Division also suggests that the state would be compelled to monitor church ceremonies "to ensure that only 'safe' levels of peyote are consumed" if the

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[13] Minutes, Or. Bd. of Pharm., April 15-16, 1987. On this subject, they read, in full: "10. Rules * * * * * d) Controlled substances—Upon motion by Gerding, seconded by Robinson and unanimously carried, the Board accepted the Federal Code 1307.31 language for a proposed rule for the Board of Pharmacy as it pertains to the use of Peyote as a controlled substance for use in the Native American Church."

requested exemption were allowed. (Br. at 18.) At present, however, the state does not appear to consider the sacramental use of peyote a problem of sufficient magnitude to even warrant prosecution. In any event, Oregon already has experience in accommodating religious exemptions. (*See:* fn. 8, *supra.*)

Petitioner has failed to identify a single other state in the entire union which has refused to exempt the *bona fide* ceremonial practices of sincere Native American Church members from application of criminal drug laws, so accommodation is obviously possible.[14] Claimants could, of course, go elsewhere. However:

> the danger to the continued existence of an ancient religious faith cannot be ignored simply because of the assumption that its adherents will continue to be able,

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[14] Eighteen states specifically exempt the sacramental use of peyote from their drug laws by statute or case law: Alaska Stat. 11.71.195; Ariz.Rev.Stat. 13-3402(B); California (*People v. Woody, supra); Colo.Rev.Stat. 12-22-1317(3); Iowa Code Ann. 204.204(8); Kan.Stat. Ann. 65-4116(c)(8); La.Rev.Stat. 40:1032; Minn.Stat.Ann. § 152-02(4); Mont.Code Ann. 54-131; NJ.A.C. Ann. 8:65-8.12; Nev.Rev.Stat. § 453.541; N.M.Stat.Ann. § 30-31-6 (D); Oklahoma (*Whitehorn v. State, supra);* S.D. Comp.Laws. § 34-20B-14(17); Texas Stat.Ann.Art. 4476-15 § 4.11.; Wisc.Stat. Ann. 161.115; Washington (*State v. Cole,* Case No. 82-1-141-0, June 29, 1982); Wyo.Stat. 35-7-1044. The codes of at least nine states contain provisions which suggest they honor exemptions afforded under federal law: Miss.Code § 41-29-111; N.C.Gen. Stat. § 90-88(d); N.D.Cr.Code 19-03.1-02.4; R.I.Gen.Laws § 21-28-2.01; Tenn.Code Ann. 39-6-403(d); Utah Code Ann. 58-37-3 (3); Va.Code § 54-524.84:1(d); Rev.Code Wash. 69-50.201(d); W.Va.Code 60A-2-20(d). *State v. Soto,* 21 Or. App. 794, 537, P.2d 142 (1976), is the only reported case in which a member of the Native American Church was denied opportunity to raise a religious freedom defense to a peyote possession charge. The defense was unsuccessful in *State v. Bullard,* 267 N.C. 599, 148 S.E.2d 565 (1966), an early case, but the evidence of record failed to establish the bona fides of defendant's alleged church membership.

> at considerable sacrifice, to relocate in some more tolerant state or country or work out accommodations under the threat of criminal prosecution. Forced migration of religious minorities was an evil that lay at the heart of the Religion Clause.

Wisconsin v. Yoder, supra, at 219 fn. 9.

In any event, a state may not outweigh a constitutional guarantee with mere assertions and speculation. Harm to its interests must be real, not imaginary. As this Court stated in *Thomas v. Collins,* 323 U.S. 528, 531 (1945), and has made clear time and again since:

> Where the line shall be placed in a particular application rests, not on such generalities, but on the concrete clash of particular interests and the community's relative evaluation both of them and of how the one will be affected by the specific restriction, the other by its absence.

Accordingly, the state interest to be weighed in *Yoder* was not the state's general interest in providing for the education of its citizens, but "the impediment to those objectives that would flow from recognizing the claimed Amish exemption." *Supra* at 221.

Here, petitioner has failed to offer concrete evidence sufficient to establish any state interest which would come to harm if Oregon is not allowed to effectuate its alleged desire to extinguish practice of the Native American religion within its boundaries.

The criminal statutes underlying the conviction in *State v. Soto,* 21 Or.App. 794, 537 P.2d 142, *cert. denied,* 424 U.S. 955 (1976), the case upon which petitioner relies as authority for its contention that respondents have no protectible constitutional right to assert in Oregon, were repealed ten years ago. The constitutionality of Oregon's current substance control laws as applied to Native American Church practices has not been adjudicated by the Oregon appellate courts. Although that issue was not properly before the courts below, both the Oregon Court of Appeals and the Oregon Supreme Court strongly suggested in dicta that, were that issue before them, claimants would likely be found exempt from criminal sanction. *Black, supra,* 707 P.2d at 1280, fn. 7, 8 and 9; *Smith, supra,* 721 P.2d at 450, fn. 2.

The conclusion that states are constitutionally required to honor the federal exemption in recognition of Native American Church members' free religious exercise rights is further compelled by passage of the American Indian Religious Freedom Act of 1978, 42 U.S.C. § 1996, which provides:

> Henceforth it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

It is evident from the legislative history of that Act that the religious use of peyote is specifically included among the rights protected.[15] As this court recently stated in *International Paper Co. v. Harmel Ouellette,* 107 S.Ct. 805 at 811 (1987):

---

[15] U.S.Code Cong. & Adm. News (1978) at 1262-1264.

> In addition to express or implied pre-emption, a state law also is invalid to the extent that it "actually conflicts with a . . . federal statute." * * * Such a conflict will be found when the state law " 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " [Citations omitted.]

III. A Denial Of Benefits In This Case Would Evidence Impermissible Hostility Toward And Discrimination Against Religion.

A. In Oregon, Unemployment Compensation May Not Be Withheld As Civil Penalty For Criminal Conduct.

The Employment Division contends that even if the state criminal laws may not constitutionally be applied to respondents, "the state at the very least has an interest in not encouraging, appearing to sanction or otherwise sponsoring an activity that violates otherwise valid criminal law policies." (Br. 24.) If petitioner took the time to examine its own law, however, it might recall that the purpose of Oregon's unemployment compensation statute is to provide a means of living for the involuntarily unemployed, not to effectuate the state's interest in enforcement of its criminal code.

The only provision of Oregon unemployment law which allows consideration of the legality of a discharged worker's conduct is Or.Rev.Stat. 657.176(3), which provides:

> If the authorized representative designated by the assistant director finds an individual was discharged for misconduct because of the individual's commission of a felony in connection with the individual's work, all benefit rights based on wages earned prior to the date of the discharge shall be cancelled if the individual's employer notifies the assistant director of

> the discharge within 10 days following the notice provided for in Or.Rev.Stat. 657.265(1) or within 20 days following the notice provided for in Or.Rev.Stat. 657.265(2), and:
>
> (a) The individual has admitted commission of the felony or theft to an authorized representative of the assistant director, or
>
> (b) The individual has signed a written admission of such an act and such written admission has been presented to an authorized representative of the assistant director, or
>
> (c) Such act has resulted in a conviction by a court of competent jurisdiction.

Thus, in *Giese v. Employment Division,* 27 Or. App. 929, 557 P.2d 1344 (1976), *rev. den.* 277 Or. 491 (1977), the Oregon Court of Appeals upheld an award of unemployment compensation benefits to a Portland State University professor who was fired as a result of his felony conviction "for conspiring with others to explode devices designed to damage or destroy certain federal buildings" located in Oregon. *Id.*, 557 P.2d at 1355. Although the professor's misconduct amply justified his discharge for unfitness, it was not found to constitute grounds for benefit disqualification. In reaching that conclusion, the court reasoned "that the phrase 'connected with his work' was added to our statute by the legislature to draw a distinction between misconduct while off-duty and misconduct in the course and scope of employment." *Id.*, at 1356. Similarly, in *Hoard v. Employment Division,* 72 Or. App. 688, 696 P.2d 1168 (1985); 79 Or. App. 62, 717 P.2d 664 (1986), where a driver for a courier service ran a red light in the employer's vehicle, caused a serious accident, and was cited for disobeying a traffic signal, the court twice reversed the administrative denial of benefits for lack of rational support for the conclusion that claimant's violation of law evidenced a wilful disregard of the employer's interest.

An individual whose off-duty use of controlled substances is the cause of his or her unemployment is entitled to benefits unless the employer is able to prove that the claimant's job performance is thereby impaired. Petitioner's own "Policy and Guidelines for Adjudication of Employer Drug Testing Cases," App. 6-10, makes it abundantly clear that, even in this politically controversial area, the Division is not a civil arm of law enforcement.

Thus, the Division requires job candidates to submit to a test for illegal drugs if required by a prospective employer but: "If the job offer is contingent upon passing a drug test, it is not considered a job offer under Or.Rev. Stat. 657.176." App. 7. Workers are expected to consent to participate in an employer's drug testing program "unless the agreement calls for submission to a patently unreasonable testing program." *Id.* With the exception of rare cases where employee substance abuse "could result in a significant threat to public safety," refusal to submit to drug testing is not disqualifying unless the "employer has 'reasonable grounds to believe' that the employee is impaired by drugs." App. 8. Because the "tests can only establish whether drugs are present in the individual's body," benefits may not be denied to employees who are discharged for failing a drug test unless the employer proves that "1) proper testing and confirmation procedures have been followed; and, 2) there is clear objective

evidence of impairment (e.g. bizarre behavior, substantial loss of productivity, etc.)." App. 9.

Oregon's policy to insulate individuals guilty of criminal conduct from the arbitrary imposition of consequent civil disabilities, and thus protect them from penalty beyond that authorized under the state criminal code, is readily apparent from its unemployment compensation statute. This policy has heretofore unequivocally been acknowledged and respected by the Employment Division and the Courts. Thus, denial of unemployment compensation in this case on grounds the "conduct is within the state's general regulatory authority," as the Employment Division proposes at pages 22 through 25 of its brief, would single claimants out for penalty rather than allow them a benefit to which they would not be entitled but for their religion.[16]

B. In Oregon, An Employee Whose Work Separation Results From Compelling Personal Reasons Is Entitled To Receive Unemployment Compensation Benefits.

When first enacted in 1935, the Oregon unemployment compensation statute provided as grounds for disqualification "proven misconduct" and voluntary leaving without "reasonable cause attributable to his employer." Oregon Laws 1935 (Special Session) ch. 70 § 4(b)(2). At the next legislative session, the grounds were changed to "misconduct connected with his work" and voluntary leaving without "good cause," Oregon Laws 1937, ch. 398, § 4, apparently to insure that the state plan met the standards prescribed by the Federal Unemployment Tax Act, 26 U.S.C. §§ 3301 *et seq.*, as condition for allowing Oregon employers to offset 90 percent of their federal payroll taxes with payments made to the state. Under the federal law, involuntary work separations for reasons other than "misconduct connected with his work" may not deprive an individual of his entitlement to benefits. 26 U.S.C. § 3304(10).

---

[16] If an individual is imprisoned for a religiously motivated crime, on the other hand, the First Amendment would not protect them from disqualification because they would not be available for work. *See:* Or.Rev.Stat. § 657.155(1)(c).

From the start, the Oregon appellate courts have correctly recognized the unemployment compensation statute as remedial legislation enacted to provide relief, rather than a tax act. As such, it has been liberally construed in favor of coverage. *Singer Sewing Mach. Co. v. State U. Compensation Com'n.*, 167 Or. 142, 116 P.2d 744 (1941). This Court, as well, observed in *National Labor Relations Board v. Gullett Gin Co.*, 340 U.S. 361 at 364 (1951), that unemployment benefits are not paid to workers "to discharge any liability or obligation of [the employer], but to carry out a policy of social betterment for the benefit of the entire state."

It is evident from the Oregon Employment Division regulation which defines "misconduct" and "good cause" that the benefit eligibility standard is one of reasonableness. Oregon Administrative Rule 471-30-038 provides:

> (3) Under the provisions of ORS 657.176(2)(a) and (b), misconduct is a wilful violation of the standards of behavior which an employer has the right to expect of an employe. An act that amounts to a wilful disregard of an employer's interest, or recurring negligence which demonstrates wrongful intent is misconduct. Isolated instances of poor judgment, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience are not misconduct for purposes of denying benefits under ORS 657.176.
>
> (4) Good cause for voluntarily leaving work under ORS 657.176(2)(c) is such that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would leave work. The reason must be of such gravity that the individual has no reasonable alternative but to leave work.

It is not a condition of entitlement that the employer be at fault and benefits are regularly awarded to individuals whose work separations are attributable to personal reasons. *See: Babcock v. Employment Division*, 25 Or. App. 661, 550 P.2d 1233 (1976) (benefits allowed to worker who left job to help his wife start stalled car and was discharged for declining to return to work as ordered by his employer because he didn't want to leave his wife with an inoperable vehicle); *Geraths v. Employment Division*, 24 Or. App. 201, 544 P.2d 1066 (1976) (employee discharged for fighting with another employee at work, not disqualified); *Gutierrez v. Employment Division*, 71 Or. App. 658, 693 P.2d 1344 (1984) (worker who quit job because of his wife's medical problems not ineligible *per se*); *Alston v. Employment Division*, 67 Or. App. 59, 676 P.2d 940 (1984) (marital difficulties may constitute good cause to leave work); *Sothras v. Employment Division*, 48 Or. App. 69, 616 P.2d 524 (1980) (rape victim whose assailant was still at large, making her afraid to stay in the area, found to have good cause to quit).

In cases where a worker is discharged for misconduct motivated by personal reasons, the question before the Employment Division is whether those personal reasons are sufficiently compelling to make the individual's departure from the employer's known standards understandable. In both *Babcock, supra,* and *Geraths, supra,* the employee's conduct was wilful and it resulted in harm to the employer's interest. The discharged workers did not, however, act with the purpose of harming their employers. Respondents' motivation to engage in behavior their employer perceived as misconduct was to exercise their religion, a constitutional guarantee. They cannot, consistently with the First Amendment, be treated less favorably than a worker whose disobedience of his employer's direct order was motivated by an unwillingness to leave his wife stranded with an inoperable vehicle.

As discussed in Part A., above, no employee in Oregon who is discharged for violation of a personnel rule is subject to disqualification simply because the conduct may also have been illegal.

Further, employees who are unable, for personal reasons, to conform their behavior to meet the employer's job requirements, are eligible for benefits. In that respect, if claimants' ingestion of peyote had resulted from relapse rather than religion, they would have been entitled to unemployment compensation. *See*: *Kaeding v. Employment Division,* 72 Or. App. 392, 695 P.2d 966 (1985) (alcoholism); *Christensen v. Employment Division,* 66 Or. App. 309, 673 P.2d 1379 (1984) (alcoholism). ADAPT's offer of the possibility of continued employment following treatment at their own expense while on leave without pay falls within Oregon's definition of unemployment, and is not considered a reasonable alternative to quitting work. *See*:

Or.Rev.Stat. 657.100; *Sothras v. Employment Division,* 48 Or. App. 69, 616 P.2d 524 at 528 (1980).

In addition, a work separation from unsuitable employment is not disqualifying. *See*: *Pauly v. Employment Division,* 74 Or. App. 479, 703 P.2d 991 (1985) (an employee who accepts unsuitable work and then quits because job is unsuitable is not subject to disqualification); *Ruiz v. Employment Division,* 83 Or. App. 609, 733 P.2d 51 (1987) (employee not subject to disqualification for leaving work which becomes unsuitable).

Pursuant to Or.Rev.Stat. 657.190, Suitable work factors:

> In determining whether or not any work is suitable for an individual, the assistant director shall consider, among other factors, the degree of risk involved to the health, safety and morals of the individual, the physical fitness and prior training, experience and prior earnings of the individual, the length of unemployment and prospects for securing local work in the customary occupation of the individual and the distance of the available work from the residence of the individual.

Like, Sherbert, Thomas and Hobbie, respondents' work separations came about because their jobs were unsuitable, for religious reasons. As the Court stated in *Thomas,* it matters not whether that unsuitability led them to resign, or the employer to discharge them.

Finally, as evidenced by the Employment Division's policies for adjudicating employer drug testing cases, an employee's refusal to comply with an unreasonable condition of employment is not cause for disqualification. Conditioning benefit entitlement on an employee's willingness to waive his or her constitutional right to free exercise of religion is unreasonable by any standards. Indeed, in this case, the condition imposed was found by the Federal Equal Employment Opportunity Commission to have been illegal. (App. 1-2.)

Under the Establishment Clause, an individual's religion may be neither an advantage nor a disadvantage. The distance the Free Exercise Clause may go without crossing that boundary is not a question in this case because claimants are not asking for benefits to which they would not be entitled had their work separation resulted from analogous non-religious conduct. Thus, denial of benefits here would exhibit invidious hostility toward and intolerance of religion. Treating these claimants differently from Sherbert, Thomas and Hobbie would also evidence a preference among religions, a result as offensive to the Establishment Clause as a preference for either believers or nonbelievers.

CONCLUSION

In *Sherbert* this Court indicated that, as long as a worker's religious conduct is not inconsistent with work in general, an individual whose unemployment is due to his or her adherence to religious beliefs may not constitutionally be denied unemployment compensation. *Sherbert*, 374 U.S. at 410 ("This is not a case in which an employee's religious convictions serve to make him a nonproductive member of society"). That is the proper place to draw the line of First Amendment protection in the

context of an unemployment compensation case, and that line has not here been crossed.

The Oregon judiciary properly applied the controlling authorities from this Court to the facts of these cases, in the context of the state's law. Accordingly, respondents respectfully request that the decisions of the Oregon Supreme Court herein be affirmed.

Respectfully submitted,

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APPENDIX A

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
AT EUGENE

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, v. DOUGLAS COUNTY COUNCIL ON ALCOHOL AND DRUG ABUSE PREVENTION AND TREATMENT, Defendant.	CIVIL NO. C85-6139-E PROPOSED CONSENT DECREE (Filed March 5, 1986)

Plaintiff Equal Employment Opportunity Commission (hereafter "EEOC" or "the Commission"), an agency of the United States Government, brought this action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. section 2000e et seq. (hereafter "Title VII"), alleging that Douglas County Council on Alcohol and Drug Abuse Prevention and Treatment (hereafter "ADAPT"), discriminated against Al Smith, a Native American, on the basis of his religion by terminating him from his position as a Counselor II. Defendant ADAPT denies the existence of any violation of Title VII and maintains that it has complied with and will continue to comply in all respects with the provisions of Title VII and other laws of the United States.

The plaintiff EEOC and defendant ADAPT being desirous of settling this action agree to this Consent Decree.

The Court having reviewed the record and considered representations of counsel, does hereby find as follows:

(1) This Court has jurisdiction over the parties and the subject matter pursuant to 42 U.S.C. section 2000e et seq.; and

(2) This Consent Decree is intended to and does, effectuate the full, final and complete resolution of all allegations of unlawful employment practices and discrimination contained in the Complaint.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

A. This Consent Decree does not constitute an admission by defendant of any violation of Title VII.

B. Pursuant to the requirements of Title VII, defendant agrees as follows:

1. To engage hereafter in no employment practices which deprive or tend to deprive any individual of employment opportunities or which discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment on the basis of that individual's religion, in violation of Title VII.

2. To revise or interpret hereafter by resolution all practices of ADAPT to eliminate any discipline against members of the Native American Church for the non-drug sacramental use of peyote during a bona fide ceremony of the Native American Church.

3. To pay by March 4, 1986, at the latest, to Al Smith the gross sum of $15,552.00 as total compensation for any and all claims which he or his assignees may have against the defendant, including any right to reinstatement. This sum of money shall constitute all back wages and interest for the time period of March 1984, to December, 1985. Appropriate deductions for Federal Insurance Contribution Act (i.e., Social Security, FICA) and Federal and Oregon Income Tax will be deducted from this gross total and paid directly to the appropriate governmental agencies by defendant The remainder of the gross sums will be paid to Al Smith, in the amount of $10,902.00. This sum is calculated as follows:

Gross	$15,552.00
Less: FICA 1984—6.7%; 1985—7.05%	1,073.00
Less: FIT (20%)	3,110.00
Less: O/T (3%)	467.00
Net Payable to Al Smith	$10,902.00

C. This Consent Decree shall not prevent defendant ADAPT from imposing reasonable and job-related standards for hiring any applicant for employment or disciplining any employee, nor from measuring the performance of their duties during the course of their employment.

D. This Consent Decree shall not prevent defendant ADAPT from requiring that no employee shall discuss with, advocate or respond to any client of ADAPT in any way having to do with any matter relating to membership in the Native American Church or the sacramental use of peyote, or the spiritual or other benefits or features of peyote, except that an employee may reasonably respond to inquiry from a client of ADAPT only that the employee has a religion, without naming or describing it, and that the religion provides spiritual support for the sobriety and continuing process of recovery of the employee.

E. The Court shall retain jurisdiction over this action for three (3) years for the purpose of effectuating this Decree.

F. Each party shall bear its own costs and attorney fees pursuant to this Decree.

DATED this 4th day of March, 1986.

/s/ James M. Burns
UNITED STATES
DISTRICT JUDGE

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APPENDIX B

STATE OF OREGON
EMPLOYMENT DIVISION
DEPARTMENT OF HUMAN RESOURCES

TO: COST CENTER MANAGERS

Address: Date: September 4, 1986

FROM: Raymond P. Thorne, Administrator

Address: Executive—00011 No. HRG:DB:ADM 12

Subject: Policy and Guidelines for Adjudication of Employer Drug Testing Cases

Some Oregon employers are now routinely administering drug tests to their employes. In recent months the Employment Division has adjudicated a number of cases where job separations have occurred as a result of employers testing for illegal drugs. Although some legal and scientific issues are still unresolved, it is evident that drug testing in some form will become a fixture of employment for many people.

It is likely that you will encounter an increasing number of drug testing related issues. In anticipation of that, we have formulated general guidelines for the adjudication of these cases. The guidelines are based upon statutes, administrative rules and caselaw. They do not, and are not intended to, establish what employers may or may not do in their own businesses. The guidelines only address the payment or denial of benefits under Employment Division law in the areas of discharge, voluntary quits, work refusals and failures to apply for work.

1. *PRE-EMPLOYMENT TESTING*

The fact that an employer requires a job candidate to take a drug test does not, by itself, render the work

unsuitable. The employer may require that job candidates show that they are not users of illegal drugs. Generally, in disputes over pre-employment drug testing the following would apply:

REFUSAL OF WORK. If the claimant refuses work because he or she is required to take a drug test, the claimant has refused work without good cause.

NOTE: If the job offer is contingent upon passing a drug test, it is not considered a job offer under ORS 657.176

FAILURE TO APPLY. If the claimant fails to apply for work because a pre-employment drug test is required, the claimant has failed to apply without good cause.

2. *CONSENT*

Employers who give drug tests generally require employes and prospective employes to consent to participate in the employers' programs. The consent is designed to inform the employe of the program and to secure the employe's acknowledgement that they will participate in the program.

For purposes of UI, the requirement that an employe consent to drug testing is not an unreasonable one. Signing a consent form or agreeing to be tested is not the same as being tested. Mere agreement to participate is not, by itself, inimical to an employment situation unless the agreement calls for submission to a patently unreasonable testing program.

Generally, in disputes over consent, where there is reasonable drug testing as described in #3 below, the following would apply:

FAILURE TO APPLY: If the claimant fails to apply for work because he or she is required to consent to participate in an employer's reasonable drug testing program, the claimant has failed to apply without good cause.

VOLUNTARY QUIT. If the claimant quits rather than consent to participate in the employer's reasonable program, the claimant has quit without good cause.

DISCHARGE. If the claimant is discharged for refusing to consent to participate in the employer's reasonable drug testing program, the claimant is discharged for misconduct.

3. *GROUNDS FOR DRUG TESTING*

For purposes of UI, an employer may require a drug test of an employe, if the employer has "reasonable grounds to believe" that the employe is impaired by drugs. However, it is not reasonable for an employer to require employes to submit to blanket or random drug testing. If the employer has no objectively demonstrable reason for conducting a test, the test is an unwarranted act that causes the work to become unsuitable. Generally it would be good cause to quit rather than submit to blanket or random testing.

VOLUNTARY QUIT. If the employer has reasonable grounds to believe an employe is impaired and the employe quits rather than be tested, the employe has quit without good cause.

NOTE. The fact that the employer has stated that it has a policy of blanket or random testing does not create good cause to leave work. Before there would be good cause to leave, the claimant must have been advised that a blanket or random drug test was imminent.

It should be pointed out, however, that in some cases employers may have legitimate grounds to conduct blanket drug tests. For example, it may be entirely justifiable for the FAA to routinely test all of its air traffic controllers, if employe substance abuse could result in a significant threat to public safety. Until and unless the legislature mandates a different result, consideration should be given to finding blanket or random testing acceptable in those comparatively rare cases where the threat to public safety is sufficiently compelling to warrant such testing.

DISCHARGE. If the employer has reasonable grounds to believe the employe is drug impaired and the employe is discharged for refusing to submit to a test, the employe has been discharged for misconduct.

NOTE. We have based our approach to the reasonableness of drug testing on current UI law and, by analogy, ORS 659.225 and 659.227, which deal with employer testing for alcohol. ORS 659.225 and 659.227 require an employer to have "reasonable grounds to believe" that an employe is under the influence of alcohol before the employer may impose a test.

4. *FAILING A DRUG TEST.*

Currently manufacturers of less expensive drug tests, such as EMIT, advise employers to confirm tests that indicate an employe has taken drugs. It is recommended that a second test of a different type be conducted to confirm the accuracy of the first test. (More expensive tests, such as gas chromatography, may not require confirmation. But these tests are not widely used as yet.) Testers are also urged to monitor the sampling procedures closely because samples can be easily tampered with. Currently drug tests cannot determine whether an individual is drug impaired. The tests can only establish whether drugs are present in the individual's body. Consequently, before benefits are denied for failing a drug test it should be shown that: 1) proper testing and confirmation procedures have been followed: and, 2) there is clear objective evidence of impairment (e.g. bizarre behavior, substantial loss of productivity, etc.).

DISCHARGE. If an employe is discharged for failing a drug test and it is demonstrated that the employe's job performance was impaired by drugs, it is a discharge for misconduct.

QUIT. If an employe fails a test and quits because a discharge is imminent, the quit is treated the same as any other quit in lieu of discharge.

NOTE. In cases involving significant threats to public safety, it may be permissible to deny benefits for misconduct where the individual fails a drug test even though there is no evidence of impairment.

These policies are necessarily general in scope and do not address all of the myriad variations that may arise in drug testing cases. The policies are designed to be used as the basic guidelines for adjudication of drug testing related cases. Questions concerning individual cases should be directed to Program Support.

A Benefit Manual update will follow.

RPT:djd

Distribution: F

REPLY
BRIEF

9 9

SUPREME COURT, U.S.
FILED
DEC 1 1987
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 86-946 and 86-947

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

EMPLOYMENT DIVISION, DEPARTMENT OF HUMAN
RESOURCES OF THE STATE OF OREGON,
RAY THORNE, Administrator,
Petitioners,
v.

ALFRED SMITH (No. 86-946)
and GALEN W. BLACK (No. 86-947),
Respondents.

**On Writ of Certiorari to the Supreme Court
of the State of Oregon**

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Respondents.

On Writ of Certiorari to the Supreme Court of the State of Oregon

REPLY BRIEF FOR PETITIONERS

I. INTRODUCTION

The claimants in these consolidated cases were fired from their jobs as drug and alcohol rehabilitation counselors because they used peyote in violation of the personnel policies and treatment philosophy of the private counseling center that employed them. The Oregon Supreme Court concluded, as a matter of state law, that claimants' conduct disqualified them from receipt of unemployment benefits. Nevertheless, the Oregon court held that the first and fourteenth amendments to the United States Constitution compelled the state to pay benefits to claimants because their disqualifying conduct—the use of a controlled substance—was religiously motivated.

In their spirited defense against a perceived government assault on their religion, claimants and their *amici* lose sight of what this case concerns. The question here is not whether the state constitutionally may prosecute claimants criminally for their conduct. No criminal action is pending or anticipated. Nor does this case involve a benefit program that specially disadvantages claimants because of their religious practices. No one who engages in the misconduct that disqualified claimants could qualify under state law to receive benefits. Thus, claimants seek more than merely to have their religiously motivated conduct removed as a bar to the receipt of benefits to which they otherwise would be entitled. They seek to create through the fact of their religion an entitlement where none otherwise would exist. Claimants do not seek relief from a state-imposed burden; they seek to compel the state to award them special benefits.

This case differs from *Sherbert v. Verner*, 374 U.S. 398 (1963), *Thomas v. Review Board of Ind. Employment Sec. Div.*, 450 U.S. 707 (1981) and *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 107 S.Ct. 1046 (1987), because the disqualifying conduct involved here is subject to strict state control for the preservation of public safety, peace and order. Possession of peyote is punishable in Oregon as a Class B felony. Our basic point to the Oregon appellate courts and to this Court has been that if an individual cannot lawfully engage in certain conduct, even when the conduct is religiously motivated, there can be no free exercise interest to assert. (Pet. Br. at 12). As a simple matter of logic as well as correct legal analysis, when the state can prohibit and punish conduct, no constitutional protection from lesser burdens on the conduct remains.

Claimants do not dispute that if the state can punish and prohibit their conduct, the state also can impose the lesser burden of disqualification from receipt of unemployment benefits. Instead, they argue at length that they are constitutionally protected from criminal prosecution for their religious use of peyote. We dispute claimants' entitlement to a constitutional exemption from Oregon's criminal law. More important, however, even if such an exemption were held to exist, it would not aid claimants here. The fact remains that claimants lay constitutional claim to receipt of unemployment benefits from the state for engaging in conduct that is directly prohibited for the population as a whole. This Court need not decide whether claimants constitutionally may be punished criminally in order to hold that the Free Exercise Clause does not compel the state to award them unique benefits for their conduct.

II. CLAIMANTS DO NOT HAVE A FREE EXERCISE RIGHT TO RECEIVE UNEMPLOYMENT BENEFITS ON TERMS MORE FAVORABLE THAN THE PUBLIC AT LARGE.

The fundamental principle underlying this Court's decisions in *Sherbert*, *Thomas* and *Hobbie* is that unemployment compensation programs must be administered with government "neutrality in the face of religious differences." *Sherbert v. Verner*, 374 U.S. at 409. Under certain circumstances, this neutrality may require that the state statutory scheme bend to accommodate different religious practices, so that adherents to a particular religion may share the benefits of the program *in common* with the public at large. As our opening brief argues, even assuming claimants are exempted from the reach of the criminal law prohibiting peyote possession, Oregon law generally bars citizens from using peyote. Thus claimants do not seek to participate in the unemployment compensation program on an equal basis with other residents of the state. This fact distinguishes the claims here from those in *Sherbert*, *Thomas* and *Hobbie*.

Claimants do not meet this argument directly. They contend that the Oregon Supreme Court decided as a matter of state law that the criminal law is irrelevant to the question of their eligibility for benefits. (Resp. Br. at 11, 26-29). However, their argument confuses the question of their disqualification under the state statutory scheme with the question whether the state constitutionally must carve out an exception to that scheme. The Oregon Supreme Court, relying on this Court's decisions in *Sherbert* and *Thomas*, concluded that for purposes of the federal constitutional balancing test the state's interests must be found in the unemployment compensation statutes only, without consideration of Oregon's criminal law interests. Looking only to the unemployment compensation scheme, the Oregon Supreme Court held as a matter of state law that claimants are disqualified from benefits for reasons unrelated to the criminal nature of their conduct.[1] But whether the United States Constitution overrides that disqualification, and whether the state's criminal law interests may weigh in the analysis, necessarily is a federal question.

Beyond that, claimants argue only that this case is like *Sherbert*, *Thomas* and *Hobbie* because here, as in those cases, an employee whose work separation results from compelling personal reasons is entitled to receive unemployment compensation benefits. Following this Court's reasoning in prior decisions, claimants argue that to award benefits in this case is simply to maintain a position of governmental neutrality, where religion is neither advantaged nor disadvantaged, and where claimants receive benefits just as they would for "analogous non-religious conduct." (Resp. Br. at 34).

That argument, however, simply misses the point. There is no "analogous non-religious conduct" when the only persons who even arguably may lawfully engage in prohibited conduct are those with particular religious beliefs. The key factor in each of this Court's prior decisions, expressly emphasized in *Sherbert*, was that the conduct was "of a kind not within the reach of state legislation." *Sherbert v. Verner*, 374 U.S. at 403. Other persons, either for personal or religious reasons, might quit or be fired for engaging in the same conduct. Because the state schemes granted benefits to those individuals when the personal reasons were compelling, the Court insisted that religious reasons be given equal dignity. Both *Thomas* and *Hobbie* quoted with approval *Sherbert's* statement that to award benefits in such circumstances "reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religion with secular institutions which is the object of the Establishment Clause to forestall." *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. at 720 and *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 107 S.Ct. at 1051 (quoting *Sherbert v. Verner*, 374 U.S. at 409).

The decisions in those cases rely on an accommodation rationale for the Free Exercise Clause analysis that fits comfortably with this Court's Establishment Clause jurisprudence. Claimants would prefer to limit the analysis to one that tests only whether an individual's interest in the free exercise of his or her religion outweighs the government's interest in a regulation that burdens that interest. That analysis, without more, is appropriate when only the Free Exercise Clause is implicated, as when government directly burdens religion either by prohibiting religious conduct (*e.g.*, criminalizing it), or by forcing individuals to perform acts fundamentally at odds with their religious practices (*e.g.*, *Wisconsin v. Yoder*, 406 U.S. 306 (1972)). But when the question involves a claim for aid or assistance from government, rather than avoidance of a restriction, it falls within the territory between the two religion clauses that is significantly more difficult to chart. In that circumstance, Establishment Clause principles also must guide the analysis.

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[1] To consider the criminal nature of claimants' conduct in the constitutional determination therefore does not, as claimants repeatedly urge, single them out for a special civil penalty, for they have no entitlement to benefits under the unemployment compensation scheme itself.

In a variety of contexts, this Court's decisions have taught that government aid flowing to religion is not problematic when it flows on equal terms to sectarian and non-sectarian interests alike. Thus, the constitution is not violated when a state pays tuition assistance to a blind student studying at a religious institution, so long as the assistance is available to all students on the same terms, regardless whether they choose sectarian or non-sectarian schooling. *Witters v. Wash. Dept. of Serv. for Blind*, 474 U.S. 481 (1986). In such circumstances, the aid "is in no way skewed towards religion" as it "does not tend to provide greater or broader benefits" for those with particular religious beliefs. *Id.*, 88 L.Ed. 2d at 855. As Justice Powell stated in concurrence in *Witters*, the Establishment Clause is not violated by "state programs that are wholly neutral in offering . . . assistance to a class defined without reference to religion." *Id.*, 88 L.Ed.2d at 857 (Powell, J., concurring, joined by Burger, C.J., and Rehnquist, J.). *Accord, id.*, 88 L.Ed.2d at 856 (White, J., concurring) and 88 L.Ed.2d at 858 (O'Connor, J., concurring).

To carve out a special award of benefits for claimants in these cases necessarily "skews" the scheme towards religion. Instead of equalizing claimants' position with other citizens who might receive benefits for engaging in the same conduct for compelling personal reasons, an award of benefits in fact would specially favor claimants. In contrast to *Sherbert*, *Thomas* and *Hobbie*, here no state citizen, other than arguably those with religious beliefs like claimants', lawfully can engage in this conduct. Thus, this governmental financial aid, unlike the assistance provided to the student in *Witters*, would flow to claimants directly *because of* rather than *in spite of* their religion. The class of citizens who may receive unemployment benefits for such conduct necessarily is defined by reference to religion when only those who practice a particular religion may engage in the conduct.

The Court struck the necessary balance in *Sherbert*, *Thomas* and *Hobbie* by adopting an accommodation rationale that focuses on government neutrality. To require the state to override its statutory disqualification for misconduct by awarding benefits in this case goes beyond that rationale. That requirement would force the state to go a step further than merely compromising its strong policies in its criminal drug laws. The state also would be required to provide a special award of government assistance on the basis of the same conduct, exclusively because of an underlying religious motivation. Providing a special award not only would undermine the state's legislative policy on an important public health and safety concern, it also would compromise Oregon's strong state constitutional policy of religious neutrality.[2] As we argued in our opening brief:

> There is no logical or policy sense to support an analysis that dictates that members of the public at large may be imprisoned for using peyote, while adherents to a particular religious faith are entitled to unemployment benefits when they are fired for violating an employer's express prohibition of peyote use. The theme in *Sherbert* and *Thomas* is that claimants should not be *disadvantaged* by virtue of their religious convictions. Here the claimants turn that theme on its head and seek to be advantaged. The Free Exercise Clause does not mandate that claimants receive such special treatment; indeed, the Establishment Clause should forbid it.

(Pet. Br. at 24-25).

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[2] *See, e.g., Salem College & Academy, Inc. v. Emp. Div.*, 298 Or. 471, 488-92, 695 P.2d 25, 36-39 (1985); *Cooper v. Eugene Sch. Dist. No. 4J*, 301 Or. 358, 368-78, 723 P.2d 298, 305-11 (1986), *appeal dismissed*, 107 S.Ct. 1597 (1987).

III. OREGON PERMISSIBLY HAS CRIMINALIZED ALL PEYOTE POSSESSION AND CLAIMANTS THEREFORE HAVE NO PROTECTED INTEREST TO ASSERT.

Claimants argue alternatively either that their disqualifying conduct was not criminal under Oregon law or that, even if their conduct was criminal, the state law prohibiting it impermissably infringes on their federally protected free exercise rights. As to the first point, claimants are flatly wrong. Their second argument, on the constitutionality of Oregon's criminal prohibitions, is addressed extensively in our opening brief, and we offer only supplemental observations.

A. Claimants Exercised Sufficient Dominion And Control Over Peyote To Be Guilty Of A Class B Felony Under Oregon Law.

Claimants argue at some length that their conduct does not fall within Oregon's criminal drug possession prohibition. (Resp. Br. at 15-17). This is an argument, however, that they raise for the first time before this Court. At all stages below, both the parties' arguments and the Oregon courts' analyses have recognized claimants' conduct as criminal.[3] Of course, state law governs whether a participant in a religious peyote ceremony has sufficient control and dominion over the drug to violate Oregon's statute. Claimants' untimely assertion of this argument has deprived the Oregon courts of an opportunity to resolve that issue expressly.[4]

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[3] *See, e.g., Smith v. Employment Div.*, Pet. App. A at App-11 (Oregon Supreme Court decision) and *Black v. Employment Div.*, Pet. App. C at App-21 (Oregon Court of Appeals). *See also* claimant Smith's brief to the Oregon Court of Appeals at pp. 11-13 and claimant Black's brief to the Oregon Court of Appeals at pp. 11-13, where claimants disputed only whether the criminal law applied to them given their religious beliefs.

[4] For claimant Smith to make this argument is particularly surprising since, in asking the Oregon Board of Pharmacy to create an exemption for religious peyote use, he and his counsel represented that such an exemption was necessary because the religious ingestion of peyote violates Oregon law. Transcript of Hearing, Or. Bd. of Pharmacy, Sept. 25, 1987 at 2-6.

However, even if this Court considers that question, it is not open to serious dispute. Claimants rely on a single Oregon case, *State v. Downes*, 31 Or. App. 1183, 572 P.2d 1328 (1977), to argue that drug possession in the course of use does not violate Oregon law. But the facts of that case were unique, and its holding is narrow.[5] In *Downes*, police officers saw an unidentified person intravenously inject the defendant with drugs. The prosecutor charged the defendant with both criminal use of drugs and criminal possession of drugs. The Oregon Court of Appeals concluded that defendant could not be found guilty of possession where the relevant conduct consisted of another person's injection of drugs into the defendant, and defendant exercised control and dominion over them only to the extent that the drugs were in his bloodstream. *Id.*, 31 Or. App. at 1186, 572 P.2d at 1330.

That rationale simply does not extend to one who exercises sufficient dominion and control over drugs to administer them to him or herself. Nor have the Oregon courts so extended it. Indeed, under Oregon case law, possession may be actual or constructive, and a person may have constructive possession by being present in a place where he or she shares the right of control with others.[6] A person who attends the peyote ceremony with an equal right to participate in peyote ingestion by asking for and taking the drug has sufficient dominion and control over the drug by presence alone to be guilty of illegal possession. Accordingly, each of the claimants in this case unquestionably violated Oregon law when they attended the peyote ceremony, asked for peyote and consumed it.

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[5] In fact, *Downes* is sufficiently narrow that it has never been cited or relied upon in any other Oregon appellate decision.

[6] *See, e.g., State v. Coria*, 39 Or. App. 507, 592 P.2d 1057 (1979) and *State v. Nehl*, 19 Or. App. 590, 528 P.2d 555 (1974), *rev. denied* (1975).

B. Oregon's Criminal Law Prohibiting Peyote Possession Is Constitutional.

Our opening brief discusses at length Oregon's compelling interest in prohibiting peyote possession and in not exempting religious use from the scope of that prohibition. Claimants and their *amici* do not dispute that Oregon has a vital interest in regulating hallucinogens such as peyote. However, they sharply disagree that the state's interest extends to religious ceremonial use of the drug, at least when that use is in the course of Native American Church ceremonies, and perhaps at least when practiced by Native Americans. (*See, e.g.*, NACNA Br. at 58-59).

Claimants' and their *amici's* central theme is that peyotism has a several-hundred year tradition of religiously sincere, culturally significant and both morally and physically responsible use of peyote. They argue that the state's health and welfare interests therefore are not triggered by the drug's use in Native American Church ceremonies. Implicit in their approach to this case is the assumption that the problem that religious drug use exemptions would cause is small because any such exemption likely would be limited to the Native American Church's use of peyote. Therefore, claimants urge that under a free exercise analysis, their interest in religious drug use outweighs the state's interest in prohibiting that use.[7]

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[7] It is not clear whether claimants also are urging that they are entitled to exemption under the American Indian Religious Freedom Act (AIRFA). They refer to the Act, but they have not developed an argument based on it or asserted directly that it somehow preempts state law. (Resp. Br. at 25-26). Any such argument would not assist claimant Black, who is not a Native American and

We have no basic dispute with claimants' and their *amici*'s representations about the history of peyotism and peyote's use and importance in religious ceremonies. Similarly, they have no basic dispute about the dangers of the drug if it is misused or abused.[8] The parties' disagreement on this point thus narrows to one issue: Whether a state must grant religious exemptions to individuals who have not in the past abused a dangerous substance, who assure that they will not do so in the future, and who are sincere in their religious motivations for a drug's use.

Government should not have to compromise its health and safety interests with such exemptions from danger-

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cannot invoke whatever protections the Act affords. Nor would it have any merit, even as to claimant Smith. The express terms of the Act and its legislative history unequivocally demonstrate that it is directed to federal executive agencies, not state governments, and that Congress sought merely to require those agencies to follow the first amendment. *See*, 42 U.S.C. § 1996; U.S. Code and Admin. News (1978) at 1262 (the Act's purpose is to insure that the policies and procedures of various federal agencies, as they may affect traditional Native American practices, are consistent with the federal free exercise guarantee). *See also Bowen v. Roy*, 106 S.Ct. 2147, 2152 (1986) (AIRFA "accurately identifies the mission of the Free Exercise Clause itself"). Thus, the Act contributes nothing to the analysis in these cases.

[8] Claimants and their *amici* dispute our reliance on various texts and articles to support our description of the health hazards posed by peyote use. Their level of outrage at our use of what they perceive to be "extra-record evidence" is exceeded only by the level of their own reliance on the same type of materials. We submit, however, that both their reliance on such sources and ours is appropriate. Rather than establishing "adjudicative facts" (*i.e.*, relating to the facts of these particular cases), these sources support assertions that are "legislative" in nature (*i.e.*, having relevance to lawmaking reason and policy, whether in the course of deciding cases or in the legislative enactment of laws). *See* Fed. R. Evid. 201 advisory note. For this purpose, they are matters of general knowledge of which the Court properly can and often does take judicial cognizance. *See, e.g., Muller v. Oregon*, 208 U.S. 412, 421 (1908); *Brown v. Board of Education*, 347 U.S. 483 (1954).

ous drug laws. This position is not "ethnocentric" (Resp. Br. at 12), "thinly-veiled governmental arrogance," (NACNA Br. at 11), or designed "to engender unwarranted emotional hysteria," (*id.* at 9).[9] Rather, it stems from a realistic recognition that government's unquestioned health and safety interest in drug regulation necessarily is severely comprised if it must exempt religiously motivated drug use whenever a single religious believer or group of religious believers promises to use drugs responsibly. Claimants and their *amici* never answer our concern that many sets of religious beliefs exist, or may come into existence, which call for drug ingestion as a sincere religious practice, thus causing religious

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[9] *Amici's* attacks on the State of Oregon are inappropriate and misdirected in other respects. The NACNA *amicus* brief, for example, states that "contrary to assertions by the State of Oregon, peyote use in Native American Church ceremonies does not provide an alcoholic or drug addict with a means of escape from reality through alternative substance abuse." (NACNA Br. at 8). The State of Oregon has never made such an assertion, and NACNA does not cite to a source for its statement that we have. Similarly, the NACNA brief chastises the State of Oregon for giving claimants no real alternative but to be fired from employment, and for coercing them through state personnel policies to admit that their use of peyote constituted drug abuse. (*Id.* at 9-10). *Amici* apparently do not understand that claimants were employed by a private drug and alcohol counseling center, not by the State of Oregon. The state had no part in setting the employer's personnel policies, or in the decision to fire claimants pursuant to them.

Finally, both claimants and *amici* rely on the private employer's decision to enter into a consent decree when it was sued under Title VII for alleged religious discrimination. (*E.g.*, Resp. Br. at 13 and n.7). Obviously, the state had no part in the employer's decision to settle that lawsuit, a decision that may have been driven only by an assessment that the employer could not afford to defend its policy. The settlement of that lawsuit does not establish the illegitimacy of the employer's personnel policy; it does not diminish the state's interests in its controlled substances laws; and it does not alter the Oregon Supreme Court's state law determination that claimants committed misconduct and were disqualified from benefits under the statutory scheme.

drug use to become wide-spread. Claimants suggest only that courts are fully able, on a case-by-case basis, to test the sincerity of those beliefs and to discover those that are fraudulent. Apparently, they are satisfied that the level of religious drug use will remain low because only members of the Native American Church will be found to be sincere.

But that is no answer. The state has never, in the course of this proceeding, implied disrespect for claimants' religious beliefs or suggested disbelief in their sincerity. We similarly are in no position to assume in the abstract the insincerity of other religious groups which profess the importance of drug use. The potential for the result in this case to have broad reach is real.

For example, the Native American Church represents only one segment of those who believe that peyote is a deity. As the discussions in claimants and *amici's* briefs reveal, peyotism and the Native American Church are not synonymous. Peyotism has existed as a religious belief system for hundred of years. Its origins evidently are in Mexico, and in the late Nineteenth Century it spread widely among Native American tribes in the United States. The Native American Church, which combines beliefs in peyotism and Christianity, is only one of several churches that have formed out of peyotism. The church has existed at a national level for less than 50 years and many of its chapters restrict membership to Native Americans. (*See generally* NACNA Br. at 1-3, 11-20).

The very history on which *amici* and claimants rely to build a case for a Native American Church exemption is a history that does not belong to the Native American Church, at least not exclusively. It may well be that there are many sincere peyotists who either cannot join the Native American Church, or who choose not to. *See, e.g., Peyote Way Church of God v. Smith*, 742 F.2d 193

(5th Cir. 1984) (granting exemption to church founded by former member of Native American Church who objected to the church's policies of racial discrimination and its failure to recognize certain religious teachings). But they, too, may be entitled to an exemption, either under free exercise principles, if claimants' arguments are correct, or under equal protection principles in those jurisdictions where the Native American Church successfully has obtained express legislative exemption.

The ramifications of claimants' arguments are much broader than they acknowledge, at least with respect to peyotism. We submit they are broader with respect to religious drug use in general as well. As our opening brief demonstrates, many religious organizations have sought exemptions from drug laws for use of peyote, LSD, all psychedelic drugs, marijuana, hashish and others. (Pet. Br. at 19). Their sincerity has not necessarily been suspect. In several instances, for what may be little more than ethnocentric reasons, courts have simply been unwilling to extend exemptions to any drug other than peyote and to any group other than to Native Americans. *See, e.g., United States v. Rush*, 738 F.2d 497, 511-13 (1st Cir. 1984) (despite sincere religious beliefs of members of the Ethiopian Zion Coptic Church that marijuana use is integral to the practice of their religion, they are not entitled to an exemption on the same basis as peyote since American Indians and their beliefs in peyote use have special status). However, under the analysis claimants and their *amici* offer, we have no confidence that those religious practices can be distinguished on any principled basis. Accordingly, as our opening brief contends, laws regulating drugs threaten to become a patchwork of prohibitions requiring an ad hoc religion-by-religion or drug-by-drug assessment of the law's enforceability. Claimants do not, and cannot, refute the crippling effect that result would have on the government efforts to regulate controlled substances.

Claimants nevertheless assert that to deny them an exemption will require this Court to overrule *Wisconsin v. Yoder*, 406 U.S. 205 (1972). We disagree. Concededly, there are many parallels between this case and *Yoder*. As was true of the Amish in *Yoder*, this religion has a long tradition of adherence to its belief system, its beliefs are sincere, and its religious practices are inseparable from the religion's basic tenets. But this Court was careful in *Yoder* to emphasize that the prospect of sending children through school to age 14 instead of to age 16 did not involve any demonstrated or reasonably inferred "harm to the physical or mental health of the child or to the public safety, peace, order, or welfare." *Id.*, 406 U.S. at 230.

In contrast, this case unquestionably involves conduct that poses (whether or not it causes in any single instance) grave health hazards. Moreover, the possibility of ad hoc religious exemptions genuinely threatens the integrity of the states' overall regulatory efforts. Finally, *Yoder* involved a question of degree—*i.e.*, the difference in discontinuing compulsory education at age 14 rather than 16. As one of the concurring opinions expressly pointed out (Justice White, joined by Justices Brennan and Stewart, 406 U.S. at 238), and as the majority analysis implicitly suggested, it would have been a very different case if the Amish had asserted that they should be entitled to avoid completely the state's compulsory education laws. This case, however, involves a religious claim that requires the state to sacrifice its regulatory interest altogether.

Finally, two related points raised both by claimants and their *amici* merit response. They assert that the Oregon Legislature never has determined peyote to be a dangerous substance. They note that the legislature has delegated to the Board of Pharmacy authority over controlled substance schedules. Further, they claim that the Board of Pharmacy is in the process of exempting

Native American Church religious use from the reach of those schedules. These points have no bearing on the status of Oregon law at the time of the claimants' conduct at issue here. In any case, claimants' assertion regarding state legislative policy on peyote is disingenuous at best and their prediction that the Board of Pharmacy will exempt certain religious peyote use is little more than hopeful speculation by proponents of such an exemption.

The mere fact that the Oregon Legislature has elected to rely upon an administrative agency to review and classify dangerous drugs in no way suggests legislative indifference or neutrality with respect to the dangerousness of peyote or any other drug that is controlled pursuant to the statutory scheme. It is beyond serious dispute that Oregon's public policy unequivocally declares peyote to be a dangerous substance and therefore prohibits its use.[10]

As our opening brief recounts, the Board of Pharmacy has considered the creation of an exemption for certain religious peyote use at claimant Smith's behest. However, the board has not implemented any such exemption and it is extremely doubtful that the board will do so, or

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[10] In fact, the legislature has shown a firm unwillingness to place peyote on anything less than the most rigorously controlled schedule. Prior to 1981, Oregon's statutes authorized the state Committee on Controlled Substances to "add, reclassify or delete" any drug from the federal schedules "based on the total hazard potential of the substance," and required the Board of Pharmacy to accept the committee's reclassification. Former Or. Rev. Stat. §§ 475.025, 475.015. In 1980, the committee proposed to reschedule several drugs. Drugs like peyote, LSD, mescaline and heroin would have been removed from Schedule I and placed on Schedule III. Members of the legislature and community believed the proposed rescheduling of peyote and other drugs was irresponsible. *See* Senate Bill 543, Exhibit E, Senate Committee on Justice, Hearing of April 7, 1981. As a result, legislation abolishing the committee and giving the scheduling responsibility to the board passed with little opposition. (Senate Bill 543, 1981 Legislative Session).

that, if it did, its action even would be lawful. The creation of exemptions from criminal penalties is the business of the legislature, not the Board of Pharmacy. The board is charged with responsibility for determining whether a drug should be placed on or removed from various controlled substance schedules. It is not authorized to declare what the effects of scheduling or unscheduling drugs will be for various user groups.[11]

Moreover, the exemption sought by claimant Smith and considered by the board would apply only to religious use of peyote by members of the Native American Church. This narrow, denomination-specific exemption almost certainly would violate both the Oregon and United States Constitutions.[12]

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[11] The board's statutory directive is to determine when "a change in or addition to the schedule of a controlled substance is justified." Or. Rev. Stat. § 475.035(2). In making those decisions, the board is to review "the scientific knowledge available regarding the substance, its pharmacological effects, patterns of use and misuse, and potential consequences of abuse, and consider the judgment of individuals with training and experience with the substance." Or. Rev. Stat. § 475.035(1). The board then must publish the classification of controlled substances within 30 days following "revision of any classification or reclassification of a controlled substance." Or. Rev. Stat. § 475.055.

Under these statutes, the board's authority is limited to determining what substances are placed on or removed from the various controlled substances schedules. The board does not have the authority to place a particular substance on the schedule (*e.g.*, peyote) and then to exempt certain users or user groups from the reach of the restrictions that apply by virtue of the scheduling decision. Exemptions from the schedules must be made by the legislature. *E.g.*, Or. Rev. Stat. § 475.135(3) (certain individuals engaging in research exempted from criminal prosecution for possession and distribution of controlled substances); former Or. Rev. Stat. § 475.515 (patients undergoing chemotherapy or glaucoma treatment exempted from laws forbidding marijuana possession when used pursuant to physician prescription; repealed by Or. Laws 1987, ch. 75 § 1).

[12] The Attorney General has advised the Board of Pharmacy that an exemption for religious use of peyote applicable *only* to the

CONCLUSION

The decision of the Oregon Supreme Court, holding that the first amendment entitles claimants to unemployment compensation benefits in spite of their work-related misconduct, should be reversed. The cases should be remanded to the Oregon Supreme Court with instructions that it vacate its judgment and reinstate the Employment Appeals Board's order denying benefits.

Respectfully submitted,

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Native American Church is almost certainly unconstitutional under the Oregon Constitution, (*see Salem College & Academy, Inc. v. Emp. Div.*, 298 Or. 471, 695 P.2d 25 (1985)), and possibly under federal principles as well. *See Kennedy v. Bureau of Narcotics and Dangerous Drugs*, 459 F.2d 415 (9th Cir. 1972), *cert. denied*, 409 U.S. 1115 (1973). We have also advised the board, that, although it is a difficult question, there is some possibility that a religious use exemption for one Schedule I substance (peyote) could require the state to give similar exemptions for other Schedule I substances, or for drugs deemed less dangerous under Oregon law (*e.g.*, marijuana), in order to avoid either state or federal law based claims of religious discrimination.

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
JUL 28 1987
JOSEPH F. SPANIOL, JR.
CLERK

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Nos. 86-946 & 86-947

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

EMPLOYMENT DIVISION, OREGON DEPARTMENT OF
HUMAN RESOURCES, ET AL., PETITIONERS

v.

ALFRED L. SMITH (No. 86-946) and
GALEN W. BLACK (No. 86-947), RESPONDENTS

ON WRITS OF CERTIORARI TO THE OREGON SUPREME COURT

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QUESTIONS PRESENTED

1. Was certiorari improvidently granted when the state interest sought to be vindicated in this Court—Oregon's interest in effectuating its criminal prohibitions—is an interest that the Oregon Supreme Court held, as a matter of state law, not to be relevant in making unemployment compensation eligibility determinations, and where in any event it cannot be determined on this record whether the discharged employees in these cases violated any Oregon law?

2. Absent any finding that an employee accepted a job knowing or anticipating that the employer's conditions of employment would conflict with the employee's religious practices, does the Free Exercise Clause permit a state to deny unemployment benefits to an employee who has been discharged because such a conflict subsequently arose, where the state's only interest in denying benefits under state law is to protect its unemployment fund from dilution?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

Nos. 86-946 & 86-947

EMPLOYMENT DIVISION, OREGON DEPARTMENT OF
HUMAN RESOURCES, ET AL., PETITIONERS

v.

ALFRED L. SMITH (No. 86-946) and
GALEN W. BLACK (No. 86-947), RESPONDENTS

*ON WRITS OF CERTIORARI TO THE
OREGON SUPREME COURT*

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION AND THE ACLU FOUNDATION OF OREGON SUPPORTING RESPONDENTS

OPINIONS BELOW

The opinion of the Oregon Supreme Court in *Smith* (No. 86-946) is reported at 301 Or. 209, 721 P.2d 445, and is reproduced in the *Smith* certiorari petition as App. A. The opinion of the Oregon Court of Appeals is reported at 75 Or. App. 764, 709 P.2d 246, and is reproduced in the *Smith* petition as App. C.

The opinion of the Oregon Supreme Court in *Black* (No. 86-947) is reported at 301 Or. 221, 721 P.2d 451, and is reproduced in the *Black* certiorari petition as App.

A. The opinion of the Oregon Court of Appeals is reported at 75 Or. App. 735, 707 P.2d 1274, and is reproduced in the *Black* petition as App. C.[1]

JURISDICTION

The Oregon Supreme Court's decisions in *Black* and *Smith* were issued on June 24, 1986. Reconsideration was denied in *Smith* on September 2, 1986, and in *Black* on September 3, 1986. The petitions in both cases were timely filed on December 2, 1986. Review was granted and the two cases were consolidated on March 9, 1987. This Court's jurisdiction rests on 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const., Amend. I:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *."

Or. Rev. Stat. § 657.176(2)(a) (1985):

> "An individual shall be disqualified from the receipt of benefits * * * if the authorized representative designated by the assistant director [of the Employment Division] finds that the individual:
>
> (a) Has been discharged for misconduct connected with work * * *."

Or. Admin. R. 471-30-038(3) (1986):

> "Under provisions of ORS 657.176(2)(a) * * *, misconduct is a wilful violation of the standards of behavior which an employer has the right to expect of an employee. An act that amounts to a wilful disregard of an employer's interest, or recurring negligence which demonstrates wrongful intent is misconduct. Isolated instances of poor judgment, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience are not misconduct for purposes of denying benefits under ORS 657.176."

Or. Rev. Stat. § 657.176(3) (1985):

> "If the authorized representative designated by the assistant director [of the Employment Division] finds an individual was discharged for misconduct because of the individual's commission of a felony or theft in connection with the individual's work, all benefit rights based on wages earned prior to the date of the discharge shall be canceled if the individual's employer notifies the assistant director of the discharge * * * and:
>
> (a) The individual has admitted commission of the felony or theft to an authorized representative of the assistant director, or
>
> (b) The individual has signed a written admission of such act and such written admission has been presented to an authorized representative of the assistant director, or
>
> (c) Such act has resulted in a conviction by a court of competent jurisdiction."

INTEREST OF *AMICI CURIAE*

The American Civil Liberties Union ("ACLU") is a nationwide, non-partisan organization of over 250,000 members. It was founded over 60 years ago and is dedicated to defending and preserving the principles embodied in the Bill of Rights. The ACLU of Oregon, one of its state affiliates, filed an *amicus* brief in the Oregon Supreme Court in support of respondents Smith and Black. The ACLU has been involved in many of the leading First Amendment cases in which Free Exercise rights have been threatened.

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[1] References to items reproduced in appendices to the Employment Division's *Smith* and *Black* certiorari petitions will be to "*Smith* Pet. App- ——" or "*Black* Pet. App- -——".

INTRODUCTION

The Employment Division's entire argument in this Court rests on two false premises. The first is that the state's criminal law-enforcement interests are implicated in these cases. They are not. The Oregon Supreme Court held, as a matter of state law, that the Employment Division's justifications for denying a claimant unemployment benefits are to be found, if at all, not in the objectives of the state's criminal code, but in those of its unemployment compensation statute.

The second false premise is that the use of peyote is a criminal offense in Oregon. It is not. The statute under which it was an offense—a misdemeanor—was repealed in 1977. Possession of peyote remains unlawful, but it is impossible to tell on this record whether either of the respondents could be prosecuted for, let alone convicted of, that offense or any other.

Once it is understood that these basic premises are false, it is plain that no federal question of substance is presented and that the writs should be dismissed as improvidently granted.

STATEMENT OF THE CASE

1. The respondents in these cases—Galen W. Black (No. 86-847) and Alfred L. Smith (No. 86-946)—are members of the Native American Church. Each was employed as a rehabilitation counselor by the Douglas County Council on Alcohol and Drug Abuse Prevention and Treatment (ADAPT), a private, nonprofit organization. See Black Tr. 6-7.[2]

Black, a former alcohol and drug abuser, was hired by ADAPT on September 12, 1982. At the time, he was not a member of the Native American Church. Black joined the church, and began attending church ceremonies, in March 1983. Black Tr. 29-30. On September 10, 1983, Black attended a weekend Teepee ceremony at which he ingested a nominal amount of peyote as a sacrament—a quantity insufficient to produce any hallucinogenic effect. See Black Tr. 34-35. That is the only occasion on which Black is alleged to have used any drug while employed by ADAPT. Black Tr. 13.

Smith, a former alcohol abuser, was hired by ADAPT on August 25, 1982. At the time, Smith was a member of the Native American Church. On March 4, 1984, Smith attended a weekend Teepee ceremony at which he ingested a nominal amount of peyote as a sacrament—again, a quantity insufficient to produce any hallucinogenic effect. See Smith Tr. 41-42. This was the only occasion on which he used any drug while employed by ADAPT. See Pet. Br. 9 n.4; Smith Tr. 14, 43; Smith Ex. 6.

There is no suggestion that Black or Smith went to work for ADAPT intending or expecting to use peyote thereafter. Black did not even belong to the Native American Church when he was hired by ADAPT. He felt no religious impulse to participate in the peyote sacrament until he had been a member of the church for six months. Smith determined to use peyote at a church ceremony only after ADAPT had discharged Black. He did so apparently as an expression of religious solidarity. See Pet. Br. 9 n.4; Smith Tr. 37-38, 51-52; Smith Ex. 4.

2. Black was suspended by ADAPT on September 19, 1983, for using peyote at the Teepee ceremony. On October 3, 1983, he was discharged after refusing to resign or undergo treatment for substance "abuse." Black was discharged for "misconduct connected with work" within the terms of Or. Rev. Stat. § 657.176(2)(a). He was discharged not because he had violated any law, but because he had violated ADAPT's unwritten

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[2] "Tr." refers to the transcript of the hearing before the referee. "Ex." refers to exhibits received in evidence by the referee. "Index Item" refers to the record on review in the Oregon courts. "Pet. Br." refers to the Brief for Petitioners in this Court.

"policy" forbidding any use of alcohol or non-prescription drugs by staff members who were former substance abusers. As ADAPT's Executive Director testified, "we would have taken the same action had [Black] consumed wine at a Catholic ceremony * * *." Black Tr. 27.

At the time, ADAPT's written personnel policy proscribed only "misuse" or "abuse" of alcohol or drugs by staff members, and it said nothing about alcohol or drug use by staff members who were former substance abusers.[3] Following Black's discharge, ADAPT amended its written personnel policy to provide that *any* use of alcohol or non-prescription drugs by staff members who were former substance abusers would be grounds for discharge. Smith Tr. 10; Smith Ex. 2. According to ADAPT's Executive Director, this had been ADAPT's policy all along, conveyed verbally to all new employees. Smith Tr. 30. However, ADAPT's Executive Director also acknowledged that the written personnel policy was amended after Black's discharge because its language in this regard lent itself to "misinterpretation." Smith Tr. 35.

Nonetheless, Smith used peyote at the Teepee ceremony on March 4, 1984. He did so apparently as an expression of religious solidarity in the wake of Black's discharge and the Employment Division's subsequent denial of unemployment benefits to Black on February 3, 1984. See p. 7, below. Smith, too, was discharged for "misconduct connected with work" under the provisions of Section 657.176(a)(2)—that is, for violating ADAPT's policy forbidding any use of alcohol or non-prescription drugs by staff members who were former substance abusers. He was not discharged because ADAPT considered his conduct illegal. As ADAPT's Executive Director acknowledged, "that was not the basis for the action." Smith Tr. 35.

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[3] See Black Ex. 2, *ADAPT Personnel Policy*, Part V(A)(3) and (9), Part IV, Part X(B)(1)(f), reprinted in the Joint Appendix.

3. Following their discharge, Black and Smith each applied for unemployment compensation benefits.

(a) On November 4, 1983, the Assistant Director for Employment of the Employment Division found that Black had been discharged for "violat[ing] a known company policy," and that this conduct disqualified Black from receiving unemployment benefits under Section 657.176(a)(2). Black Index Item 1, page 1.

Black then sought a hearing before a referee. The referee ruled on December 8, 1983, that Black had exercised "poor judgment" in using peyote but was not guilty of "misconduct," and therefore could not be denied benefits under Section 657.176(a)(2). Black Index Item 4, page 5. On February 3, 1984, the Employment Appeals Board—ignoring Black's Free Exercise claim—reversed the referee's ruling. It held that Black's behavior constituted "misconduct" disqualifying him from unemployment benefits. *Black* Pet. App-23.

On October 16, 1985, the Oregon Court of Appeals, in an *en banc* decision, reversed the Appeals Board on the ground that the Board had not given sufficient consideration to Black's Free Exercise claim. 707 P.2d at 1277. If Black's ingestion of peyote was religiously motivated, the court ruled, denial of unemployment benefits would be improper. *Id.* at 1279-80. The court noted but did not comment on ADAPT's contention that all ADAPT employees "understood" ADAPT's policy to forbid *all* alcohol and non-prescription drug use by former substance abusers, even as a sacrament. *Id.* at 1276.

The Court of Appeals rejected the Employment Division's contention that a separate Oregon statute making possession of peyote a crime justified denial of unemployment benefits:

> "Here, claimant was terminated for a violation of an employer rule prohibiting the use of drugs or

> alcohol by former abusers of those substances. The fact that there is an independent set of criminal laws which made his conduct coincidentally illegal is irrelevant, because he was not terminated for breaking the law. The question is not whether the state's action can be justified by the compelling interest of protecting the health and interest [sic] of the public. That justification is not advanced, nor could it be, because the relevant state action is not a criminal charge * * * but the denial of unemployment benefits. As noted above, the question is whether the state has a compelling interest in denying claimant's benefits because he violated a personnel rule." *Id.* at 1280 (footnote omitted).

Therefore, putting the state's general interest in law enforcement aside as a matter of state law, the Court of Appeals held that the remaining state interest asserted by the Employment Division—preventing dilution of the state's unemployment fund by employees who are "undeserving due to their own conduct" (*id.* at 1278)—was not sufficiently compelling to override Black's Free Exercise rights. The court remanded for further findings. *Ibid.*

On June 24, 1986, the Oregon Supreme Court unanimously affirmed, relying on its decision in *Smith.* See pp. 9-10, below. The court held, however, that remand was unnecessary because "there is no genuine dispute that the ingestion of peyote is a sacrament of the Native American Church, that [Black] was a member of that Church and that his religious beliefs were sincerely held." 721 P.2d at 454.

(b) On March 22, 1984, the Assistant Director found that Smith had been discharged for "deliberately violating a known company policy," and that this behavior constituted disqualifying "misconduct connected with work" within the terms of Section 657.176(a)(2). He barred Smith from receiving benefits. Smith Index Item 1, page 1.

Smith then sought a hearing before a referee. In a decision issued on July 23, 1984, the referee agreed that Smith's conduct constituted "misconduct" within the meaning of the statute. But the referee ruled that Smith could not be denied unemployment benefits under the First Amendment because the conduct that led to his discharge was religiously motivated. *Smith* Pet. App-23 to 25.

On August 28, 1984, the Employment Appeals Board reversed. It agreed that Smith's conduct constituted "misconduct" under the statute but held that the state's interest in enforcing "the proscription of illegal drugs" and in protecting its unemployment fund outweighed Smith's right to use peyote for religious purposes. *Smith* Pet. App-20. On October 16, 1985, the Court of Appeals summarily reversed, relying on its opinion in *Black.* 75 Or. App. 764, 709 P.2d 246 (per curiam). See pp. 7-8, above.

On June 24, 1986, the Oregon Supreme Court affirmed the Court of Appeals. It held that "[t]he denial of unemployment benefits significantly burdened Smith's free exercise rights." 721 P.2d at 450. Canvassing the relevant state statutory schemes, the Oregon court held that any state interest justifying that burden "must be found in the unemployment compensation statutes, not in the criminal statutes proscribing the use of peyote." *Ibid.*

The Oregon court noted that, in certain specified circumstances, the state unemployment statute does disqualify from unemployment benefits employees who have been discharged for criminal conduct. 721 P.2d at 450 n.3 (quoting Or. Rev. Stat. § 657.176(3)). But the court found that "[t]his statute does not apply to [Smith]." *Ibid.*[4] The Oregon Supreme Court rejected the Employment Division's contention that the state's interest in preserving its unemployment fund from dilution justified the burden on Smith's Free Exercise rights. *Id.* at 450-51.

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[4] Section 657.176(3) is set forth in full at p. 3, above. The Employment Division conceded in the Oregon Supreme Court that "the commission of an illegal act or conviction of a crime is not, in and

4. On July 18, 1984, the Equal Employment Opportunity Commission—acting on Smith's complaint—found "reasonable cause" to believe that ADAPT had violated Title VII of the Civil Rights Act of 1964 in discharging Smith for his sacremental use of peyote. *Smith* v. *ADAPT*, EEOC Charge No. 10184281, Determination, p. 2 (July 18, 1984).[5] After the EEOC filed suit against ADAPT in federal district court, ADAPT agreed (without admitting any Title VII violation) "to eliminate any discipline against members of the Native American Church for the non-drug sacramental use of peyote during a bona fide ceremony of the Native American Church." Consent Decree, pp. 2-3, ¶ B(2), *EEOC* v. *Douglas County Council*, Civ. No. C85-6139-E (D. Or. March 5, 1986).[6] ADAPT later settled with Black on similar terms, *Black* v.

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of itself, grounds for disqualification from unemployment benefits." Memorandum at 17. Moreover, the Employment Division recognized that Black and Smith could not have been denied benefits under Section 657.176(3) because, among other things, neither had admitted to or been convicted of the commission of a work-connected felony. *Ibid.*

The Employment Division acknowledged that the Employment Appeals Board has no authority to determine whether a discharged employee has committed a crime. *Id.* at 18 (citing *Diamond Fruit Growers, Inc.* v. *Employment Division*, 26 Or. App. 617, 553 P.2d 1080, 1082 n.2 (1976)). The Employment Division stressed to the Oregon Supreme Court in its petition for reconsideration in *Smith* that the respondents' conduct "is misconduct within the meaning of [Section] 657.176(2)(a) not because it was criminal, but because it violated a standard of behavior which the employer had a right to expect of an employee." Petition at 1 n.1.

[5] The EEOC Determination Letter is reprinted, *infra*, as Appendix A. The EEOC's "reasonable cause" finding appears at App. 3a.

[6] The Consent Decree is reprinted as Appendix A to the Respondents' Brief. ADAPT's pledge appears therein at App. 3.

ADAPT, Case No. E84-1520 (Or. Cir. Ct., Douglas County), *dismissed per stipulation*, March 31, 1986.

Neither Black nor Smith returned to ADAPT. However, under the Consent Decree, ADAPT apparently could not today discharge staff members who belong to the Native American Church for using peyote at church ceremonies for religious purposes.

SUMMARY OF ARGUMENT

1. The writs should be dismissed as improvidently granted. The heart of the Employment Division's argument in this Court is that the Oregon courts erred in ruling that the state's criminal law-enforcement interests are not relevant in assessing the validity of decisions concerning a claimant's eligibility for state unemployment compensation benefits. Pet. Br. 10-11. But the Oregon Supreme Court held—as matter of state, not federal, law—that the validity of such decisions are to be assessed not in light of the objectives of the state's criminal code, but in light of the objectives of the state's unemployment compensation statute. This Court cannot second-guess that state-law judgment.

Even if the Oregon courts were somehow required, as a matter of federal law, to consider the state's criminal law-enforcement interests in cases such as these, it is entirely unclear whether Black or Smith in fact committed any criminal offense. Under Oregon law, possession of peyote is a crime but use of peyote is not; and, under Oregon law, use of a controlled substance does not prove possession. Black and Smith have not been charged with or convicted of any offense. Nor have they confessed to any. Review in this Court cannot be justified on the Employment Division's mere assertion that Black and Smith engaged in illegal conduct, especially since the assertedly illegal conduct is not in fact illegal.

2. If the writs are not dismissed, the judgments of the Oregon Supreme Court should be affirmed. These

cases are controlled by *Hobbie* v. *Unemployment Appeals Commission*, 107 S. Ct. 1046 (1987). Like Hobbie, Black and Smith accepted employment not knowing or anticipating that someday they would be unable, for religious reasons, to comply with their employer's conditions of employment. In these circumstances, neither Black nor Smith may be denied unemployment compensation benefits because they used peyote at a religious ceremony after being hired by ADAPT—any more than Hobbie could be denied unemployment benefits because she became a Seventh-Day Adventist, precluding her work on Sabbath, after accepting employment with Lawton.

ARGUMENT

I. THE WRITS SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED

A. As a Matter of State Law, the Lawfulness of Black and Smith's Conduct Is Irrelevant in Determining Their Eligibility for Unemployment Benefits

Whether these cases present any federal question of substance depends on whether, as a matter of federal law, a state's courts *must* treat as relevant the state's criminal law-enforcement interests in assessing the validity of a state agency's decisions concerning a claimant's eligibility for state unemployment compensation benefits. This Court has never suggested, much less announced, such a rule. It could not have. Such a rule would displace the law-giving power of the state courts in hopeless disregard of our federal system.

If the state courts remain free to construe the mandates of state law, the only federal question presented here is whether the state's interest in protecting its unemployment fund from dilution is sufficiently compelling to justify denial of benefits to employees who have been discharged for religiously motivated conduct. This Court has already answered that question in the negative twice —in *Sherbert* v. *Verner*, 374 U.S. 39 (1963), and *Thomas* v. *Review Board*, 450 U.S. 707 (1981). The Employment Division does not urge the Court to reconsider it yet again.[7]

The Oregon Supreme Court in *Smith* and the *en banc* Court of Appeals in *Black* both squarely held that the state's criminal law-enforcement interests are *not* relevant in assessing the validity of state unemployment compensation eligibility determinations. Those courts concluded, as a matter of *state* law, that the Employment Division's justifications for denying unemployment benefits must be found in the policies of the state unemployment compensation statute—or not at all. See *Smith*, 721 P.2d at 450-51; *Black*, 707 P.2d at 1280.

Neither court purported to derive this conclusion from any rule of federal law, and nothing in their opinions suggests that either court "'felt compelled by what it understood to be federal constitutional considerations to construe * * * and apply its own law in the manner it did.'" *Delaware* v. *Prouse*, 440 U.S. 648, 653 (1979) (quoting *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977)). Instead, the Oregon Supreme Court noted that the state unemployment compensation statute specifically addresses disqualification of claimants who have been "'discharged for misconduct because of the commission of a felony or theft in connection with the [claimant's] work.'" 721 P.2d at 450 n.3 (quoting Or. Rev. Stat. § 657.176(3)). But the court concluded that this statutory basis for disqualification did not apply to Smith or Black.[8]

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[7] The Employment Division appears to contend that the state does not have to justify its denial of benefits to Smith and Black at all because, it asserts, the conduct for which they were discharged by ADAPT, although religiously motivated, was unlawful: "If an individual cannot lawfully engage in particular conduct, even when religiously motivated, there is no free exercise interest to assert." Pet. Br. 6. As discussed below, the lawfulness of Black and Smith's conduct cannot be determined on this record.

In any event, the fact that the state may prohibit certain conduct, although religiously motivated, does not mean that the conduct does not implicate the Free Exercise Clause. It means only that the state's interest in prohibiting the conduct is sufficiently compelling, and the prohibition in question is precisely enough drawn, to justify the resulting burden on Free Exercise rights. See *United States* v. *Lee*, 455 U.S. 252, 257-58 (1982) (citing *Prince* v. *Massachusetts*, 321 U.S. 158 (1944), and *Reynolds* v. *United States*, 98 U.S. 145 (1879), as cases in which that standard was satisfied).

In view of the specific provision made in Section 657.176(3) for disqualification of a claimant based on criminal behavior in connection with his employment, there is nothing surprising in the Oregon Supreme Court's conclusion that "[t]he State's interest in denying unemployment benefits to a claimant discharged for religiously motivated misconduct must be found in the unemployment statutes," and not in the state's criminal code. 721 P.2d at 450. The Oregon court's decision in this regard followed a settled state-law principle—that a claimant's unlawful conduct as such cannot supply a basis for his disqualification. See *Geise* v. *Employment Division*, 27 Or. App. 929, 557 P.2d 1354 (1976).[9]

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[8] Neither Black nor Smith was discharged for "the commission of a felony or theft in connection with the [claimant's] work." The Employment Division instead found that each was discharged for willfully violating the employer's rules. Moreover, neither Black nor Smith has admitted the commission of a work-connected felony or been convicted of any such felony—prerequisites for disqualification under Section 657.176(3).

The Oregon Supreme Court held, on the record before it, that this provision would not support disqualification in these cases. This Court should reject the Employment Division's veiled attempt to rely here on a state-law ground for denial of benefits that it expressly disavowed reliance on at the administrative level and in the state courts. See p. 9, n.4, above. Cf. *SEC* v. *Chenery*, 318 U.S. 80 (1943).

[9] In *Geise*, the Court of Appeals held that a state university professor who was discharged after being convicted of conspiring to damage or destroy federal property was entitled to unemployment benefits because his misconduct, while unlawful, was not work-connected. 557 P.2d at 1357. The university had discharged the professor because of his felony conviction. *Id.* at 1355.

The Oregon Legislature has defined the conditions under which a claimant's criminal conduct may serve as a basis for disqualification from unemployment benefits—*i.e.*, where the claimant was discharged because of a work-connected felony. The Oregon Supreme Court has decided that the Employment Division may not administratively expand those conditions by invoking the state's criminal law-enforcement interests as a general justification for disqualification, when a claimant is discharged for other reasons. That is a state-law decision this Court may not alter or revise.

Whether a state *could* justify the denial of unemployment benefits under the First Amendment as a narrowly tailored means of effectuating compelling criminal law-enforcement objectives thus is not a question in these cases. Any decision by this Court in that regard here would be purely advisory. The writs should be dismissed as improvidently granted because "the controversy * * * primarily implicates questions of [Oregon] law and presents no federal question of substance." *Wolf v. Weinstein*, 372 U.S. 633, 636 (1963).[10]

B. Even if the Lawfulness of Black and Smith's Conduct Were Relevant, It Has Not Been Established That Their Conduct Was Unlawful

In its brief, the Employment Division asserts—unaccountably—that peyote use is against the law in Oregon and that Black and Smith "violated state criminal law" because they used peyote at religious ceremonies. *E.g.*, Pet. Br. 6, 7, 8, 11-22, 23, 24. However, as Black and Smith demonstrate in their merits brief and as discussed below, peyote use is *not* against the law in Oregon, and neither Black nor Smith has been charged with, confessed to, or been convicted of, any criminal offense.

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[10] For the reasons stated in the Respondents' Brief and the *amicus* brief of the American Jewish Congress, we do not believe that the state could meet its burden under the First Amendment, even if the state's criminal law-enforcement objectives were relevant here.

Under Oregon law, *possession* of a controlled substance—but not *use* of a controlled substance—is a criminal offense. See Or. Rev. Stat. § 475.992(4)(a) (1985).[11] The non-prescribed use of narcotics and dangerous drugs was once a *misdemeanor* under Oregon law (former Or. Rev. Stat. § 167.217), but the statute creating this offense was repealed in 1977. Or. Laws 1977, ch. 745, § 54.[12] The Oregon Court of Appeals specifically held under the repealed statute that use alone does not prove possession. *State* v. *Downes*, 31 Or. App. 1183, 572 P.2d 1328, 1330 (Or. Ct. App. 1977).[13] The Oregon Legislature expressly

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[11] Section 475.992(4)(a) provides:

> "It is unlawful for any person knowingly or intentionally to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his professional practice, or except as otherwise authorized by ORS 475.005 to 475.285 and 475.991 to 475.995. Any person who violates this subsection with respect to:
>
> (a) A controlled substance in Schedule I, is guilty of a Class B Felony."

[12] Repealed Section 167.217(1) provided that:

> "A person commits the offense of criminal use of drugs if he knowingly uses or is under the influence of a narcotic or dangerous drug, except when administered or dispensed by or under the direction of a person authorized by law to prescribe and administer narcotic drugs and dangerous drugs to human beings."

Peyote use fell within the proscription of Section 167.217(1) because peyote was classified as a "dangerous drug" under former Or. Rev. Stat. § 475.010(b)(1). When the Oregon Legislature repealed Section 167.217(1) in 1977, it also repealed Section 475.010(b)(1). Or. Laws 1977, ch. 745, § 54.

Under former Section 167.217(3), criminal use of drugs was a misdemeanor rather than a felony. Black and Smith therefore could not have been disqualified from benefits under Section 657.176(3) of the unemployment compensation statute for using peyote even if the criminal prohibition of Section 167.217(1) were still on the books. The repeal of Section 167.217(1) became effective July 1, 1978. Or. Laws 1977, ch. 745, § 56.

[13] Under Or. Rev. Stat. § 161.015(8) (1985), "possession" is defined as "hav[ing] physical possession or otherwise * * * exer-

has prohibited local governments from making the use of a controlled substance a crime or even a civil offense. Or. Rev. Stat. § 430.325(1)(e) (1985).

On this record, Black or Smith could not be convicted of "possession" of a controlled substance. Moreover, the *en banc* Court of Appeals in *Black* questioned the continuing vitality of an earlier panel decision declining to recognize a religious exemption from this prohibition under the First Amendment. 707 P.2d at 1280 & nn. 8, 9 (citing *State* v. *Soto*, 21 Or. App. 794, 537 P.2d 142 (1975), *cert. denied*, 424 U.S. 955 (1976)). The Oregon Supreme Court in *Smith* itself pointedly observed that "[t]he federal government and several states exempt the religious use of peyote through case-law, statute or regulation." 721 P.2d at 450 n.2.

In short, it could not be established that Black or Smith violated any Oregon law in merely *using* peyote at the Teepee ceremonies. And it would be obviously improper to assume that, if prosecuted, either Black or Smith would be convicted of the crime of *possessing* a controlled substance. The presumed illegality of Black and Smith's conduct lies at the heart of the Employment Division's arguments in this Court, but, at the very least, "the facts do not appear with sufficient clarity to enable [this Court] to decide that question." *Gilbert* v. *California*, 388 U.S. 263, 269 (1967). For this additional reason, the writs should be dismissed. *Ibid.*[14]

---

cis[ing] dominion or control over property." These are not alternative tests. The *Downes* court stated that, "[u]nder the statutory definition, the exercise of dominion or control over the property is necessary." 572 P.2d at 1330.

[14] It would be truly ironic if Oregon were permitted to deny benefits to Smith and Black under the "misconduct" provision of Section 657.176(a)(2) when the EEOC found "reasonable cause" to believe that ADAPT violated Title VII of the Civil Rights Act of 1964 in firing them for that "misconduct." See pp. 10-11, above.

II. ALTERNATIVELY, THE JUDGMENTS SHOULD BE AFFIRMED UNDER *HOBBIE, THOMAS* AND *SHERBERT*

Because the lawfulness of the conduct for which Black and Smith were discharged by ADAPT is not relevant here, only two questions need be considered by this Court to decide these cases on the merits—whether Black and Smith took their jobs with ADAPT without anticipating that their religious practices would conflict with ADAPT's conditions of employment; and whether the state's interest in denying them benefits (to protect its unemployment fund from dilution) outweighs their First Amendment rights.

A. Black and Smith Accepted Their Jobs Without Anticipating That a Religious Conflict Would Subsequently Arise

The Employment Division repeatedly complains that Black and Smith, in using peyote at the Teepee ceremonies, knowingly violated ADAPT's "policy" proscribing all use of alcohol or non-prescription drugs by staff members who were former substance abusers. But this is not the issue. The issue is whether, when Black and Smith took their jobs with ADAPT, they either expected or intended to engage in the conduct for which they were discharged, assuming that such conduct in fact was prohibited by ADAPT at that time.[15]

---

[15] The Employment Division found that Black and Smith were aware when they accepted their employment with ADAPT of its unwritten "policy" against any alcohol and drug use by staff members who were former substance abusers. But there was no evidence or finding that Black and Smith had specific notice that even sacramental use of alcohol or drugs was forbidden. If Black and Smith, when hired, were unaware that sacramental peyote use would violate ADAPT's policies, Black and Smith would stand in a

Neither ADAPT nor the Employment Division has ever suggested that Black and Smith, in going to work for ADAPT, intended or expected ever to use peyote for religious purposes in violation of ADAPT's policies. As discussed above, Black joined the Native American Church only after he had been employed by ADAPT for six months, and he did not feel a religious impulse to use peyote at a church ceremony for six months more. Smith did not feel any religious impulse to use peyote for religious purposes until after Black had been discharged.

Thus, when Black and Smith went to work for ADAPT, they stood in exactly the same position as Hobbie when she went to work for Lawton. Hobbie knew when she was hired that she would have to work on Friday nights and Saturdays; but she was not a Seventh-Day Adventist at the time and had no reason to believe that Lawton's schedule would present any problem. Hobbie became a Seventh-Day Adventist after beginning employment, and her new faith precluded her from working her scheduled shifts.

Smith, of course, already belonged to the Native American Church when he went to work for ADAPT. But the record indicates that Smith's view of his religious obligations changed as a result of ADAPT's treatment of Black. It is immaterial that his view changed. Just as civil courts may not undertake to decide which of two believers "more correctly perceive[s] the commands of their common faith" (*Thomas*, 450 U.S. at 716), so they may not decide that Smith's shift in his view of his

---

position analogous to that of Sherbert and Thomas, whose employers changed the conditions of their employment after hiring them. See *Sherbert*, 374 U.S. at 399 n.1; *Thomas*, 450 U.S. at 709-10.

religious obligations was disentitling, as long as it was sincere.[16]

B. The State's Interest in Protecting Its Unemployment Fund from Dilution Cannot Justify the Denial of Benefits

In its petition for review in the Oregon Supreme Court, the Employment Division relied heavily on the state's asserted criminal law-enforcement interests in justifying the denial of unemployment benefits to Smith and Black. It placed similar emphasis on these asserted interests in its memorandum responding to the Oregon Supreme Court's questions to the parties, and in its petition for reconsideration.

The Employment Division also argued that the state's interest in protecting its unemployment fund from dilution justified the denial of benefits. And the Oregon Supreme Court concluded that this interest was the only state interest at issue. Relying on *Sherbert* and *Thomas*, the Oregon court held that interest insufficient to outweigh the burden on Black and Smith's Free Exercise rights. 721 P.2d at 450-51.

The Employment Division does not contend in this Court that this state interest is sufficient to outweigh the burden on Black and Smith's Free Exercise rights. Instead, it invokes a melange of other state interests—actually, *employer* interests—never urged in the Oregon courts, to explain why it is unreasonable to require the state to award benefits to claimants in Black and Smith's position. Pet. Br. 25-28.

---

[16] Like the petitioner in *Thomas*, Smith "drew a line, and it is not for us to say that the line he drew was an unreasonable one. Courts should not undertake to dissect religious beliefs because the believer admits that he is 'struggling' with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ." *Thomas*, 450 U.S. at 715.

Specifically, the Employment Division contends that Oregon has a compelling interest in protecting the overall "integrity" of its unemployment compensation *scheme*. Pet. Br. 26. It says this interest is jeopardized if employers are required to contribute to an unemployment compensation fund that awards benefits to employees who are discharged for "working against an employer's interests in the process of religious observance." Pet. Br. 27. The Employment Division asserts, conclusorily, that "[a] system that operates in [this] way * * * undermines public respect for and confidence in the unemployment compensation laws." *Id.* at 28.

The Employment Division did not assert this amorphous "public confidence" interest in the Oregon Supreme Court. Assuming that this all-purpose interest is anything more than a makeweight—and assuming that it would in fact be jeopardized by the award of benefits in cases such as these—the Employment Division may not seek reversal of the judgments of the Oregon court by advancing arguments neither presented to nor considered by that tribunal. See *Heath* v. *Alabama*, 106 S. Ct. 433, 436-37 (1985). See also *Sherbert*, 374 U.S. at 407.[17] The only argument available to the Employment Division in this Court—that the denial of benefits to Black and Smith is justified by the state's interest in protecting its unemployment fund from dilution—is one that, for good reason, the Employment Division does not press here.

It is not for this Court to decide on behalf of the Oregon Supreme Court whether any other state interests are implicated in these cases.[18]

---

[17] In *Sherbert*, South Carolina argued for the first time on appeal that the possibility of fraud by claimants in Sherbert's position justified denying her benefits. This Court dismissed that possibility as "not apposite here because no such objection appears to have been made before the South Carolina Supreme Court." 374 U.S. at 407. "[W]e are unwilling to assess the importance of an asserted state interest without the views of the state court." *Ibid.*

[18] The Employment Division's suggestion that Black and Smith somehow sabotaged ADAPT by using peyote is absurd. ADAPT

CONCLUSION

For the foregoing reasons, the writs should be dismissed as improvidently granted. Alternatively, the judgments of the Oregon court should be affirmed.

Respectfully submitted.

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suspended Black and discharged Smith immediately upon learning of their participation in the Teepee ceremony. Just when they are supposed to have "interfered" with ADAPT's interests (Pet. Br. 26) is never specified. See EEOC Determination Letter, *infra*, App. 3a. The Employment Division's contention in this regard is particularly ludicrous in light of the EEOC Consent Decree, by which ADAPT promised that it would not again discipline members of the Native American Church for sacramental peyote use at religious ceremonies. See pp. 10-11, above.

APPENDIX A

APPENDIX A

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

• Seattle, Washington 98101 •

July 18, 1984

Charge No. 101842891

Al Smith
1049 N. 44th Street
Springfield, Oregon 97477 Charging Party

Douglas County Council on
Alcohol & Drug Abuse Prevention & Treatment
621 W. Madrone
Roseburg, Oregon 97470 Respondent

DETERMINATION

The Charging Party alleged that he was discharged by Respondent because of his religion. He claims that following his participation in a Native American Church ceremony which included the sacramental use of peyote he was discharged from his position as an alcohol and drug abuse prevention specialist.

Respondent is a private, non-profit organization which provides counseling and educational services. The Respondent confirms that the Charging Party was discharged on Monday, March 5, 1984, following his participation in a Native American church ritual during the previous weekend. According to Respondent, this termination was based on the Charging Party's violation of Respondent's personnel policies which require "the avoidance of all substance abuse" by its staff and which empower its Executive Director to terminate employees for the "misuse of alcohol and/or other mind-altering substances by a staff member."

Examination of the evidence shows the following facts which indicate there is reasonable cause to believe that the Charging Party's allegation is true:

> The Charging Party is a Native American who has attended Native American Church ceremonies over a period of the last five years, and who is recognized as a member of this church.
>
> The sacramental use of peyote in Native American Church ceremonies is, because of its religious nature, expressly exempted from the controls of the Controlled Substances Act of 1970.
>
> The Respondent does not dispute the bona fide nature of the ceremony in question or of Charging Party's belief.
>
> The Respondent maintains that ". . . . our policy in this regard has, nonetheless, been made quite clear and very public: use of any mind-altering drug, including alcohol, by recovering staff, in *any* situation is not acceptable, and is grounds for termination. This agency, through the Executive Director and others has made many statements to the effect that if a recovering alcoholic counselor working for ADAPT were to receive wine at communion, that would be grounds for termination."

Through stating and defending its policy in this manner, Respondent indicates a belief that since its policy is applied to all persons in an evenhanded way it could not be discriminatory. This reasoning evidences a misunderstanding of the requirements of Title VII, and of the protection of freedom in religious practices, which is based on *individual* belief and activity rather than *comparative* treatment.

Respondent also stated, in justification of its policy, that just a strict enforcement is necessary to protect the "role modeling" that staff provide to clients in treatment. They state, "Any recovering staff person who ingests a mind-altering drug or alcohol destroys that credibility, and so seriously undermines the counseling process."

However, Respondent put forth no evidence to support this conclusion. In the instance of the Charging Party, Respondent stated that he was terminated immediately upon his return to work following participation in the ceremony. The termination occurred prior to any further contact between Charging Party and his clients, before any possible "undermining" based on Charging Party's activity could have occurred.

Having examined the entire record, the Commission concludes that there is reasonable cause to believe that the Respondent has violated Title VII of the Civil Rights Act of 1964, as amended, in the manner alleged through their discharge of the Charging Party.

Having determined that there is reasonable cause to believe that Respondent has engaged in unlawful employment practices in violation of Title VII of the Civil Rights Act of 1964, as amended, the Commission now invites the parties to join in a collective effort toward a just resolution of this matter. A "Notice of Conciliation Process" is enclosed for your information. A representative of this office will be in contact with each party in the near future to begin the conciliation process.

On Behalf of the Commission:

/s/ Donald W. Muse
DONALD W. MUSE,
District Director

7-16-84

Date

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
JUL 29 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-946 ⑥
No. 86-947 ⑥

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

EMPLOYMENT DIVISION,
DEPARTMENT OF HUMAN RESOURCES,
of the STATE OF OREGON
RAY THORNE, Administrator
and ADAPT,
Petitioners,

v.

ALFRED SMITH (No. 86-946)
and GALEN W. BLACK (No. 86-947)
Respondents.

On Writ Of Certiorari To The
Supreme Court Of The State Of Oregon
For The Third Circuit

BRIEF AMICI CURIAE NATIVE AMERICAN CHURCH OF NORTH AMERICA AND NATIVE AMERICAN CHURCH OF NAVAJOLAND, INC. IN SUPPORT OF RESPONDENTS

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10pp

This brief is dedicated to the work of Dr. Omer C. Stewart, Professor of Anthropology, University of Colorado, Boulder, Colorado, who has selflessly committed his life's energy to the "stubborn fight for what Americans generally take for granted: religious freedom" for Indian peyotists. Dr. Stewart has spent most of the past 50 years tracing, in painstaking detail, the history of the Peyote Religion, to one end:

"The truth shall make ye free".
John 8:32

No. 86-946
No. 86-947

IN THE
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DEPARTMENT OF HUMAN RESOURCES,
of the STATE OF OREGON
RAY THORNE, Administrator
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Petitioners,

v.

ALFRED SMITH (No. 86-946)
and GALEN W. BLACK (No. 86-947)
Respondents.

Pursuant to Rule 36.2 of the Rules of the Supreme Court of the United States, the Native American Church of North America, Rural Route 1, Box 46, Walthill, Nebraska 68067; and the Native American Church of Navajoland, Inc., P.O. Box 2898, Shiprock, New Mexico 87420, file the attached brief *amici curiae* in support of Respondents in the above-captioned case. Both parties have consented in writing to the filing of this brief; said letters of consent accompany this brief, as required by Rule 36.

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INTEREST OF AMICI CURIAE

The Native American Church of North America was incorporated under the laws of the State of Oklahoma, originally filed with the Oklahoma Secretary of State, on April 17, 1950. By 1955, thirteen state chapters of the Native American Church of North America had incorporated under the laws of their respective states. Most Native American Church groups are affiliated with the NACNA. Today incorporated groups exist in seventeen states. Also, the Church is incorporated in the State of Texas where exists the only source of supply of peyote in the United States.

The purpose of the organization is stated in Article 2 of the Articles of Incorporation, as follows:

> "The purpose of this Church shall be to foster and promote religious belief in Almighty God and the customs of the several tribes of Indians throughout

> North America in the worship of a Heavenly Father; to promote morality, sobriety, industry, charity and right living; and to cultivate a spirit of self-respect and brotherly love and union among the members of the several tribes throughout North American. . . ."

The Native American Church of Navajoland began in 1966, and was formally incorporated under the laws of the State of New Mexico in 1972. The Church's Articles of Incorporation state as follows:

> SECTION I. We, members of NACNL, Inc., contend that our human rights shall be guaranteed and protected by the Bill of Rights through the Constitution of the United States of America, and further contend that the use of peyote. . . is necessary to the survival and preservation of Navajo religion and culture; that our peyote religion, being an integral part of Navajo culture, is protected by Public Laws 95-341, 92 Stat. 469, "The American Indian Religious Freedom Act;" Public Law 91-513, "Comprehensive Drug Abuse and Prevention and Control Act of 1970", and Title 17, Section 394(c), of the Navajo Tribal Code.

* * *

> SECTION III. We pledge ourselves to protect, preserve and promote the religious belief in Almighty God, and the customs of our Tribe in the worship of a Heavenly Father; to promote self-reliance, morality, sobriety, industry, charity, and right to living; to control and administration and services and to cultivate a spirit of self-respect and brotherly love among the members of our Tribe, other Tribes of Indians throughout North America, with the right to own property for the purpose of conducting its business and service. We sincerely place explicit faith, hope, and belief in our Church through which we worship God. We further pledge ourselves to work for unity in the use of Peyote, as a Sacrament and as a means of Divine healing through its Divine Power.

In recent years, the movement back to traditional Indian lifestyles has contributed greatly to the increased membership in the Native American Church. Present estimates by officials of the Church put the figure at a minimum of 400,000 members. The majority of these members reside in those eighteen states having significant Indian populations.

The sacramental use of peyote in the rites of the Native American Church is very complex and not given to simple explanation. To the members, it is consecrated with powers to heal body, mind and spirit. It is a teacher; it teaches the way to spiritual life through living in harmony and balance with the forces of the Creation.

The rituals are an integral part of the life process. They embody a form of worship in which the sacrament Peyote is the means for communicating with the Great Spirit. Just as everything must be complete in and of itself, the rites include an appropriate sequence of ceremonial forms. Through prayer and meditation, the participants prepare themselves to receive the powers of healing and cleansing; through the music

and testimonials, they exalt their Creator.

The Indian way of life is based on their holistic philosophy of the universe in which everything is predestined and interdependent. Reciprocal relationships are fostered and maintained through respect for all of creation. In this experiential existence, they attempt to live in concert with the forces of nature and with other human beings.

It is for these reasons *amici* Native American Church of North America and the Native America Church of Navajoland, Inc., are gravely concerned about the claims proferred by the State of Oregon in this case concerning peyote use by Church members, and why *amici* file this brief.

ARGUMENT

I.

SUMMARY OF ARGUMENT

The Peyote Religion, or Peyotism, is perhaps one of the oldest religions in the Western Hemisphere. Its roots trace back at least ten thousand years before the discovery of the north American continent, to the aboriginal people of the lower Rio Grande River in the continental United States and Mexico who were familiar with peyote and its spiritual qualities.

The Native American Church, comprised of the national organization and numerous state and local chapters, is the contemporary embodiment of the Peyote Religion. Estimates of the numbers of church members run as high as 250,000 to 400,000 people, including members from most federally and non-federally recognized Indian tribes. Non-Indians

are practicing members of some Church chapters, but many chapters restrict membership to persons of Indian descent.

Peyote is the central sacrament of Native American Church ceremonies; without peyote Church ceremonies simply could not take place.[1/] Peyote is believed to embody a spiritual deity; and the ingestion of the peyote assists participants in ceremonies in communicating directly with the Creator.[2/]

Widespread pharmacological and anthropological evidence strongly supports the positive effects of peyote use in a controlled religious ceremonial setting as the most effective means for

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[1/] People v. Woody, 394 P.2d 813, 817 (Calif. 1964); State v. Whittingham, 504 P.2d 950, 951 (Ariz. App. 1973).

[2/] Affidavit of Stanley Smart, Smith Rec., Ex. 7.

combatting the negative effects of alcoholism. Contrary to assertions by the State of Oregon, peyote use in Native American Church ceremonies does not provide an alcoholic or drug addict with a means of escape from reality through alternative substance abuse. Indeed, peyote use by Church members has been proven to enhance their ability to confront and effectively deal with life's problems - emotional, psychological and spiritual.

The use of peyote in _bona fide_ Native American Church ceremonies, and by Alfred Smith and Galen Black in this case, is entitled to protection under the free exercise clause of the First Amendment to the United States Constitution. The Native American Church, despite centuries of suppression in Mexico and the United States, has proven its resilience for the very reason that it fulfills the

spiritual needs of its members.

Chemical substance abuse has reached crisis proportions in the United States and elsewhere in the world. _Amici_ do not attempt to minimize the magnitude of the problem. But _amici_ view as patently offensive the State of Oregon's efforts in this case to engender unwarranted emotional hysteria over controlled peyote ingestion in legitimate Native American Church ceremonies. In the brief that follows _amici_ will provide a useful historical backdrop and context within which this Court should view the transparent claims of the State.

As recovered alcoholics, the Native American Church and its sacrament peyote have provided Al Smith and Galen Black a source of salvation and spiritual strength. The State of Oregon gave them no real alternative but to be terminated from employment in the ADAPT program. As a means of retaining employment, Respondents, in effect, would have been coerced by the State to admit that their use of peyote constituted drug abuse and relapse, as a means of retaining employment. This is not a viable, reasonable alternative. The record evidence unequivocally reflects the strength, determination and resolve of these two men, in large measure because of their membership in the Native American Church and their spiritual use of peyote. The State would strip them of these virtues before "rewarding" them, in the State's terms, with unemployment compensation benefits. These are the very "choices" which this Court in the Sherbert, Thomas and Hobbie[3] decisions

---

[3] Sherbert v. Verner, 374 U.S. 398 (1963); Thomas v. Review Board of Indiana Employment Security Division, 450 U.S. 707 (1981); Hobbie v. Unemployment Appeals Commission of Florida, 107 S.Ct. 1046 (1987).

will not countenance; the decision here must rest squarely on that legal precedent.

II.

HISTORY OF EFFORTS TO SUPPRESS PEYOTISM

A. The Early Use Of Peyote By The Indigenous People Of Mexico And The United States

It is generally agreed by anthropologists and ethnohistorians that the indigenous people of the Rio Grande River valley in present-day Mexico and the State of Texas were the first to become aware of and use peyote for medicinal and spiritual purposes, this occurring as long as ten thousand years ago:[4]

> The eating of the peyote cactus for religious purposes was going on in Mexico before Columbus was

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[4] See Stewart, Omer C., Peyote Religion: A History, Chapter 2, pp. 16-44 (University of Oklahoma Press, Norman 1987) (hereinafter referred to as "Stewart"); and generally LaBarre, Weston, The Peyote Cult (New York 1969); Slotkin, J.S., The Peyote Religion, (Free Press, Glencoe Illinois 1956); Slotkin, J.S., The Peyote Religion: A Study In Indian White Relations, (New York 1975).

> born. The origin is lost in history, but there is a popular legend among the Aztecan peoples of Mexico's central Great Valley. The legend states that a woman went with her tribe on a berry-picking trip and got lost from the main band. She was due to give birth to a child and she did, in fact, give birth. After cutting the navel cord with a stone knife she had in her pouch, she lay helpless in the hot sun near a leafy bush with the buzzards flying overhead. In her desperation and fear, she heard a voice cry out, "eat the plant that is near you for it is life and a blessing for you and all your people."
>
> Strength returned to the woman immediately. She raised her child to her filling breasts and fed it. She related the story to her uncle who was the leader of the tribe. He stated that it was a blessing and would be given to all the people. Thus we have the legendary beginning of modern Peyotism. . . .[5]

And by the time of the Spanish Conquest of Mexico and first written records of its use, peyote was known far beyond its natural habitat, extending as far south as Oaxaca, throughout central Mexico, and as far north as Santa Fe, New Mexico.[6]

First written accounts describe peyote use by the Indians of Mexico - including the Aztec, the Chichimec, the Zacateco, the Tlascalau and several dozen other tribal groups - for medicinal, pharmacological and spiritual purposes.[7] Both individual and group spiritual uses of peyote were common.[8] From the time of conquest the Catholic Church and its missionaries regarded peyotism as an evil to be rooted out of indigenous culture.

> Scarcely forty years after Montezuma lost his empire to Cortez, the Church in Mexico began to worry about . . . what

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[5] Wachtel, D., "Peyotism", Am. Indian J. 2, 4 (1981).

[6] Stewart, *id.*

[7] Stewart, *id.*

[8] Stewart, *id.*

> the priests called Aztec idolatry. . .. The good padres feared for the souls of their flock, if not for the prestige of the Church itself. . . They were talking against a graftage of Aztec lore upon Roman liturgy. . . particularly in the case of two plants - *ololuiqui* and *peyotl*. . .. The persistence of these Aztec cults is matched only by their extraordinary hold on the Indians and by their antiquity. . .. In its desire to purge the Indians of the black magic of *ololuiqui* and *peyotl*, the Church left us the only writing we possess of the early use of either plant.[9]

A tribute to the widespread importance of peyotism, among both "pagan" Indians and Catholic converts, was the Catholic

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[9] Taylor, Norman, "Come and Expel The Green Pain." 58 *Scientific Monthly* 174-84 (1944); *quoted in* Stewart, p. 20. To purge Christian converts of the use of peyote the Church prepared a catechism for priests conducting confessionals:

> Hast thou eaten the flesh of man?
> Hast thou eaten the peyote?
> Do you suck the blood of others?
> Do you adorn with flowers places where idols are kept?

Stewart, p. 20.

Church's radical efforts to arrest its use. The Spanish Inquisition issued an edict in 1620 declaring the ingestion of peyote to be an "act of superstition condemned as opposed to the purity and integrity of our Holy Catholic Faith. . . ." Past sinners were granted absolution; but severe repercussions such as that delivered against those "suspected of heresy to our Holy Catholic Faith" were taken against "disobedient and recalcitrant" individuals.[10] More than 90 individual Indians were prosecuted for violations of the 1620 edict over a period of almost two centuries following its issuance.[11]

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[10] Ramo de Inquisicion, tomo 289, Archivo General de la Nacion, Mexico City; *quoted in* Leonard, Irving A., "Decree Against Peyote, Mexican Inquisition, 1620," 44 *American Anthropologist* 324-36 (1942).

At the same time Plains Indians from America were acquiring the horse, thereby enabling them to more easily venture into northern Mexico, and learn of new things such as peyote.[12] Although the historic evidence is mixed, the Caddo Indians of the Texas-Louisiana area were reported by Catholic missionaries in the early 18th Century to have introduced peyote into their religious ceremonies.[13] And similar accounts

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[11] Stewart, pp. 21-22. Contemporaneous Sixteenth and Seventeenth Century records of Catholic missionaries and church officials corroborate the pervasive use of peyote for spiritual purposes. See Slotkin, J. S., "Peyotism, 1521-1891", 57 American Anthropologist pp. 202-30 (1955).

[12] Stewart, id.

[13] Swanton, John R., "Source Material on the History of the Caddo Indians", Bureau of American Ethnology Bulletin, No. 132, pp. 51-52, 120-21, 210, 265-71. Washington, D.C., U.S. Gov't. Printing Office; quoted in Stewart at pp. 27-8.

are common of peyote use by other tribes in the Texas-New Mexico region, including the Carrizo Coahuilteco, Lipan Apache, the Mescalero Apache, the Tonkawa and the Karankawa.[14] In spite of the Catholic Church's efforts to eradicate peyote use by Mexican Indians, its use continued to flourish. Ironically, the efforts of the missionaries to spread Catholicism may have coincidentally fostered the spread of peyotism north into the present-day continental United States. Indians, mestizos and soldiers accompanying missionaries were reported to have carried peyote and the teachings of peyotism into "foreign" territory.[15]

The spread of Christianity by the Catholic Church also had a civilizing influence on Indian populations, which was in part responsible for changes in the peyote ceremony. Original Mexican ceremonies were regarded as more violent in nature, more "primitive." Stewart, in contrast, describes the early peyote ceremony thought to predominate in the Texas, Oklahoma and New Mexico tribes:

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[14] Stewart, pp. 45-51.

[15] Stewart, pp. 26-27.

> It was an affair of family and friends, with singing and praying, and for all its strangeness to outsiders, to its participants it carried a high moral tone, such as might characterize a mission service. While no Christian symbol, with the possible exception of the cross, can be found in early peyote ceremonies, they might be said to have had a certain Christian ambience.[16]

Over time, peyotism eventually worked its way throughout much of Indian country in the western United States. Acceptance of the religion varied from tribe to tribe, depending on a multitude of

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[16] Stewart, pp. 51-2.

factors: "the varied and broken histories of tribes, the varieties of languages and customs, the efforts of the Christian missionaries and government authorities to suppress, as well as the abilities of peyote missionaries influenced its acceptance."[17] Stewart describes in great detail the history of the introduction and spread of peyotism in Oklahoma among such diverse tribes as the Cheyenne, Arapaho, Osage, Ponca, Quapaw, Tonkawa, Delaware, Otoe, Pawnee, Sac and Fox, Shawnee and Iowa Tribes, and the Kickapoo Bands of Oklahoma, Kansas and Mexico.[18] In summary, he notes:

> By 1910 peyotism had become well established among the Indians of Oklahoma, with the exception for the most part of the Five Civilized Tribes. Nearly all of those [Indians] arriving after 1874 had taken it up to some

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[17] Stewart, p. 97.

[18] Stewart, pp. 97-127.

> extent. It spread by word of mouth, from person to person, as well as deliberately by a few dedicated believers and some self-seeking missionaries. It survived the early antagonisms of the establishment. And it changed a little as each new roadman expressed his personality in guiding the ritual, but it remained basically true to the form and spirit of its beginning.[19]

In general, the introduction of peyote to western tribes such as the Winnebago and Omaha of Nebraska, the Potawatomie, Sac and Fox, Kickapoo and Iowa Tribes of Kansas, the Crow of Montana, the Sioux of the Dakota Territory, the Gosuite and Western Shoshone, Washo, and Northern and Southern Paiute of Nevada, and the Navajo came after Oklahoma tribes, as late as the turn of the century.[20]

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[19] Stewart, p. 127.

[20] Stewart, pp. 148-212, 265-317.

B. Early Efforts To Suppress Peyote In The United States

As in Mexico, missionaries and Indian agents in the United States sought to suppress the peyote religion among Indian tribes once its proliferation became apparent.

On June 6, 1888, Indian Agent E.E. White of the Anadarko Agency, Indian Territory (Oklahoma), issued the first administrative order prohibiting the possession or use of peyote:

> Wherefore all Indians on this Reservation are hereby forbidden to eat any of said beans, or to drink any decoction or fermentation thereof, or liquor distilled therefrom, or to sell or give to any Indian or have in his possession, any of these beans. Any Indian convicted of violating this order will be punished by the cutting off of his annuity goods and rations according to the aggravation of the case. And in extreme cases the grass money will be cut off . . . .[21]

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[21] Stewart, pp. 128-29.

This order was adopted in 1890 by then Commissioner of Indian Affairs, J.T. Morgan.[22/]

Efforts to control the sale of liquor to Indians were tightened by Congress in 1897 with the enactment of the Indian Prohibition Act, which made it illegal "to furnish any article whatsoever under any name, label or brand which produces intoxication to any Indian ward of the Government." 29 Stat. 506-7 (January 30, 1897). A few federal special agents attempted to use the law to prosecute

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[22/] Stewart, p. 129. The first "Rules Governing the Court of Indian Offenses", or Indian Courts, were adopted by the Commissioner in 1883. These Rules expressly prohibited "old heathenish dances" such as the Sun Dance; the usual ritual practices of medicine man; "destruction" of property at a burial (burial of person's belongings with the person); or the use of any intoxicants. Price, Herman, Rules Governing the Court of Indian Offenses, U.S. Dept. of Interior, Office of Indian Affairs. Washington, D.C. (March 30, 1883).

Indians for selling, possessing or using peyote. After several unsuccessful attempts to prosecute peyotists under the Act, however, Indian agents realized more specific laws would be necessary.[23/]

Indian agent A.E. Woodson of the Cheyenne Territory was able to convince the Territorial government to outlaw the possession or use of the "Mescal Bean" by Indians in 1899. Section 2652, Oklahoma Session Laws at 122-23 (1899). This then became the first law in the United States expressly aimed at curbing peyote use; in effect, aimed at stopping the peyote religion in its tracks, thereby singling out peyotism for discriminatory

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[23/] Stewart at pp. 130-33. Congress in 1906 enacted tougher legislation to deal with the problem of liquor sales to Indians. 34 Stat. 328 (June 21, 1906). More unsuccessful peyote prosecutions resulted from the use of this law to harass peyotists.

EDITOR'S NOTE

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treatment.[24] But the mescal bean and peyote were found not to be the same drug; the first cases prosecuting Indians for peyote possession under the Territorial laws were dismissed on that basis.[25] Efforts by federal Indian agents to outlaw peyote at the Oklahoma Constitutional Convention in 1907 and at the first Oklahoma legislative session in 1908, however, met with no success.[26]

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[24] It is especially noteworthy that at this same time the use of peyote for Indian rituals was outlawed, peyote was legally offered for sale by pharmaceutical companies such as Parke, Davis and Company of Detroit. As late as the 1920s peyote was being prescribed for therapeutic purposes. Stewart, p. 131.

[25] Stewart, pp. 135-36.

[26] Stewart, pp. 136-38. Remarked one Oklahoma legislator:

> I have been almost overcome by the talk of these Indians and I do not believe any legislature wants to rob these Indians of their religious rights. If I have regard for any person on earth, it is for the
> (Cont. on next page.)

Notwithstanding the lack of statutory sanction, some federal Indian agents continued their rabid efforts to harass the practice of peyotism through the enforcement of administrative regulations. They also devised new schemes such as threatening to prosecute companies such as Wells, Fargo Express and others for shipping peyote and by proposing the imposition of a tariff on the importation of peyote from Mexico. These measures for a time slowed but did not stop the flow of peyote from Mexico and Texas to many peyotists in the western and midwestern United States.[27]

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[26] (Cont.)

> aborigines of our country. It is our duty to protect their rights - religious or otherwise.

Hearings on Mescal Bean Bill 1908. Oklahoma Historical Society. Stewart, p. 139.

[27] Stewart, pp. 138-40.

The efforts of a handful of zealous antipeyote federal agents continued despite widespread contradictory testimony from many of their colleagues concerning the benign and, in some instances, beneficial effects of peyotism. For instance:

- Kickapoo agent Frank Thackery (1909): "with peyote there is very rarely any violence shown from its use. . . peyote is used in religious ceremonies and peyotists have stopped the use of alcohol."
- Kaw (Kansas) agent A.R. Miller (1909): "The Indians of this tribe who use peyotes [sic] were formerly hard drinkers, but claim that now they have no appetite for alcohol. . . It is used here. . . in connection with religion."
- Cheyenne and Arapaho Agent Shell (1909): A "habit is not formed by the use of peyote." Peyote is used "in connection with religious rights." Shell had personally tested peyote under the supervision of a physician. Of his own feelings he reported: "I experienced thoughts along the line of honor, integrity, and brotherly love. . . I seemed incapable of having base thoughts. . . I do not believe that any person under the influence of this drug could possibly be induced to commit a crime. . . ."[28]

C. Efforts To Pass Federal And State Antipeyote Laws

In 1912, private individuals, Indian agents and officials of various Catholic and Protestant churchs began in earnest to lobby for a federal law against peyote. Their lobbying efforts were directed by Robert D. Hall of the YMCA. The group was unable to get favorable legislation introduced in 1912. And in 1913 they unsuccessfully tried to persuade Congress to appropriate funds to the Bureau of Indian Affairs, under the guise of the 1897 Indian Prohibition Act, "for the suppression of the traffic in intoxicating liquors and peyote." The Senate Committee on Indian Affairs, however, struck the words "and peyote" from the appropriations bill.[29] Legislation was finally introduced in 1916 by Representative Harry L. Gandy of South Dakota and Senator W.W. Thompson of Kansas, to prohibit "traffic in peyote, including its sale to Indians, ..." The bill was blocked by Senator Owen of Oklahoma and not enacted in 1916; similar legislation also failed in 1917 and 1918.[30]

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[28] Stewart, pp. 141-42.

Persuasive opposition to the early antipeyote legislative efforts came from ethnologists Francis La Flesche and James Mooney of the Smithsonian Institute's Bureau of American Ethnology. La Flesche testified before a House Committee in 1918:

> But suddenly there came a lull in all this drunkenness and lawlessness. I had a sister who was a physician, and her practice was mostly among the Indians, and she wrote me regularly about the conditions of the Omaha people. She was interested and one day I got a letter from her in which she said: "A strange thing as happened among the Omahas. They have quit drinking, and they have taken to a new religion, and members of that new religion say that they will not drink; and the extraordinary part of the thing is that these people pray, and they pray intelligently, they pray to God, they pray to Jesus, and in their prayers they pray for the little ones, and they ask God to bring them up to live sober lives; they ask help of God."
>
> She regarded that as something very strange, because the Indian, although they had missionaries for many years, could not understand the white man's religion; it was too intricate a thing for them, and they could not understand it. But the teaching of this new religion was something they could understand. In connection with this new religion they used a plant called peyote as a sort of sacrament. This peyote, they said, helped them not only to stop drinking, but it also helped them to think intelligently of God and of their relations to Him. At meetings of this new religion is taught the avoidance of stealing, lying, drunkenness, adultery, assaults, the making of false and evil reports against neighbors. People are thought to be kind and loving to one

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[29] Stewart, pp. 213-215.

[30] Stewart, pp. 217-220.

> another and particularly to the little ones.
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> The persons who are opposed to the use of peyote by the Indians in their religion say that it makes them immoral. That has not been my observation. The Indians who have taken the new religion strive to live upright, moral lives, and I think their morality can be favorably compared with that of any community of a like number in this country.[31]

Antipeyote bills were introduced again in 1919, 1921, 1922, 1923, 1924, 1926, and 1937, but none were successful.[32]

Antipeyotists met with more success in securing the passage of state criminal laws, however. Utah, Colorado and Nevada passed state laws against peyote in 1917. Kansas followed suit in 1919, as did Arizona, Montana, North and South Dakota in 1923; Iowa in 1925; New Mexico and

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[31] Stewart, pp. 220-21.

[32] Stewart, pp. 221-31.

Wyoming in 1929; and Idaho in 1933. Antipeyote forces tried to prohibit peyote first at the Nebraska constitutional convention in 1920 and again in the first legislature in 1921, without success.[33]

State laws, however, proved largely futile, and did little to impede the spread of peyotism. The absence of state court jurisdiction to prosecute the on-reservation conduct or activities rendered state law largely ineffectual.[34] Some effort was made to disrupt the transportation of peyote off-reservation where state laws applied, but these efforts were largely unorganized and haphazard, with few

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[33] Stewart, pp. 227-29. Of these twelve states, today all but three - Idaho, North Dakota and Utah - have enacted exemptions to their antipeyote laws for bona fide Native American Church ceremonial use. See Colo. Rev. Stat. §12-22-317(3) (Supp. 1982); Nev. Rev. Stat. Ann. §453.541 (1986); Kan. Stat. Ann. 565-4116(8) (1985); Ariz. Rev. Stat. Ann. §13-3402(B)(1-3) (1981); Mont. Rev. Code Ann. §94-35-123 (1947); S.D. Comp. Laws Ann. §34-20B-14(17) (1977); Iowa Code Ann. §204.204(8) (1987); N. Mex. Stat. Ann. §30-31-6(d) (Supp. 1980); Wyo. Stat. Ann. §35-7-1044 (1977).

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[34] *But see* State v. Big Sheep, 243 P. 1067 (Mont. 1926). The Montana Supreme Court reversed the conviction of Big Sheep for possessing peyote (a violation of Sess. Law 1923, Ch. 22), but not for lack of state court jurisdiction. The Court reasoned, that, although the "crime" was committed on the Crow Reservation, a remand was necessary to determine whether as a matter of fact Big Sheep was an "emancipated" Indian.

> If he is an emancipated Indian, clothed in the full panoply of citizenship, who has broken a state law, he may not defend against the power of a state by claiming as a sanctuary the house of Austin Stray Calf, although the title to that place is still in the United States. 243 P. at 1072.

Big Sheep was wrongly decided on procedural grounds, *see* Cohen, *Handbook of Federal Indian Law* Chapter Six, Section C.2.a. (2d. ed. 1982), and legislatively overturned in 1947. *See* n. 33, *supra*.

results.[35]

The New Deal era of Franklin D. Roosevelt's administration brought new faces and policy to the federal Indian administration. Both Harold L. Ickes, the new Secretary of the Interior, and John Collier, Commission of Indian Affairs, were members of the American Indian Defense Association and regarded as progressive Indian policy reformers. Collier's Bureau of Indian Affairs' Circular No. 2970, entitled "Indian Religious Freedom and Indian Culture, signaled a dramatic change in policy toward peyotists. It said, in part: "No interference with Indian religious life or ceremonial expression will hereafter be tolerated."[36]

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[35] Stewart, pp. 229-30.

[36] Stewart, pp. 231-32.

III.

CONTEMPORARY FEDERAL PEYOTE LAW AND POLICY

When Congress finally did initiate action against peyote in the 1965 Drug Abuse Control Amendments Act, its intent was clear to proscribe the *non-religious* use of the drug, thereby leaving open peyote use in *bona fide* Native American Church ceremonies.[37] So while peyote is listed as a controlled substance on Schedule I of the Controlled Substance Act, 21 U.S.C. §812(c), an express exception is provided for "the nondrug use of peyote in bona fide religious ceremonies of the Native American Church,. . . . " 21 C.F.R. §1307.31.

Congress confirmed the right to an exemption for Native American Church members' ceremonial peyote use in 1978 with the enactment of the American Indian Religious Freedom Act, 42 U.S.C. §1996 ("AIRFA"). AIRFA states the policy of the federal government "to protect and preserve for American Indians their inherent right of freedom to believe, express and exercise [their] traditional religions." *Id*. This expressly includes "use and possession of sacred objects and the freedom to worship through ceremonials and traditional rights." *Id*.

That Congress considered peyote to be a "sacred object" within AIRFA's scope is supported by the legislative history,[38] and the AIRFA Federal Agencies Task Force Report of August 1979, directed by Section 2 of Senate Joint Resolution 102 (Section 1 of which became AIRFA). The AIRFA Federal Agencies Task Force Report details the views of Native Americans concerning federal harassment over their possession and use of peyote for bona fide ceremonial purposes of the Native American Church. Congress recognized the problem when it said that:

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[37] *See* 111 *Cong. Rec*. 15977 (1965). Native American Church of New York v. United States, 468 F.Supp. 1247 (S.D.N.Y.), *aff'd*. *mem*., 633 F.2d 205 (2d Cir. 1980).

[38] "To the Indians, these natural objects have religious significance because they are sacred, they have power, they heal, they are necessary to the exercise of rites of the religion, they are necessary to the cultural integrity of the tribe and, therefore, religious survival or a combination of these reasons." 1978 U.S. Code Cong. & Adm. News 1262, 1263.

> Although acts of Congress prohibit the use of peyote as a hallucinogen, it is established Federal law that peyote is constitutionally protected when used by a bona fide religion as a sacrament. Yet, a lack of awareness or understanding of the law has led some Federal officials to confiscate sacramental substances.

1978 U.S. Code Cong. & Adm. News at 1263 (emphasis added).

Recently, in 1986, Congress took up Indian alcohol and drug abuse issues as part of the "Anti-Drug Act of 1986", Pub.

L. 99-570, 100 Stat. 3207. Sections 4201-4230 of the Act are referred to as the "Indian Alcohol and Substance Abuse Prevention Treatment Act of 1986." See 100 Stat. 3207-137 through 3207-152, codified at 25 U.S.C. §§2401 et seq. Section 4203, 25 U.S.C. §2402, states as one of the purposes of the Act to "authorize and develop a comprehensive, coordinated attack upon the illegal narcotics traffic in Indian country. . . ." (Emphasis added.) The Act does not alter or affect federal law and policy concerning peyote; thereby leaving intact the legitimate exemption for bona fide use by the Native American Church previously recognized by Congress. In short, the federal government still does not consider Indian use of peyote to be illegal, or threatening to the health, safety and welfare of the American public. See further discussion infra.

IV.

THE NATIVE AMERICAN CHURCH

A. Incorporation Of The Native American Church

Largely to deflect attack from the more dominant, mainstream religions and antipeyotist elements in the state and federal governments, in 1918 Otoe peyote practitioners first formally organized by submitting articles of incorporation to the State of Oklahoma.[39] This first church was known as the First Born Church of Christ, a biblical reference,[40] the membership of which was largely confined

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[39] An "organized" but unincorporated church known as the Peyote Society, or Union Church, was known to be in existence in 1914. Safford, William E., "An Aztec Narcotic", 6(7) Journal of Heredity 291, 306 (1915).

[40] "One Church of the Firstborn. . . and to Evanglize and spread Scriptural Holiness over all lands and to all people." Hebrews 12:23.

to the Otoe Tribe.[41]

That same year another group of Oklahoma peyotists met to establish the Native American Church. Article II of the Church's Articles of Incorporation state the purpose of the organization:

> The purpose for which this corporation is formed is to foster and promote the religious belief of the several tribes of Indians in the State of Oklahoma, in the Christian religion with the practice of the Peyote Sacrament as commonly understood and used among the adherents of this religion in the several tribes of Indians in the State of Oklahoma, and to teach the Christian religion with morality, sobriety, industry, kindly charity and right living and to cultivate a spirit of self-respect and brotherly union among the members of the Native Race of Indians, including therein the various Indian tribes in the State of Oklahoma.[42]

From the outset the Native American

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[41] Stewart, pp. 223-24.

[42] Stewart, p. 224 (emphasis added).

Church membership fervently worked to oppose antipeyote legislation on the federal and state levels. In 1925 the Church appointed a special delegate to Washington, D.C. to monitor the introduction or status of pending legislation on the subject.[43/] The opposition to prohibitive legislation added a cohesive element to the Church, which was rapidly gaining popularity in Oklahoma and elsewhere. By 1925, the Church reported a membership of 1500 in Oklahoma alone.[44/]

Today there are a quarter million, perhaps as many as 400,000 members of the Native American Church in the United States. Precise numbers are impossible to determine, inasmuch as no membership

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[43/] Stewart, p. 226.

[44/] Stewart, p. 226.

or participant lists are maintained by either state chapters or regional/national Church organizations such as the Native American Church of North America.[45/]

Omer Stewart describes in general a typical Native American Church ceremony:

> Except for the changes described below, the ritual remains the same. It generally begins about nine o'clock on a Saturday night. Today the participants are both men and women, although men are usually the leaders. They come dressed in their best clothes, having clean shirts and dresses. Many men wear a silk handkerchief around the neck, folded in a particular way and held together with a silver bola in the form of some peyote symbol - a button, a peyote bird, a cross. Some may wear red bean necklaces or other Indian jewelry, and some will have decorated cases which hold ceremonial feather fans handsomely beaded and tasseled with buckskin, to be used for incensing themselves with cedar

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[45/] Stewart, p. 327.

smoke, and small gourd rattles similarly decorated. Some will wear blankets and shawls, for things Indian are the preferred dress. Some, especially women, will wear moccasins.

Even if the ceremony is held in a house, the peyotists sit on the floor in a circle, the roadman[46] facing east, the chief drummer to his right and the cedarman to his left. The ceremony begins when the roadman takes from a special case his ceremonial paraphernalia consisting of a staff, usually carved or ornamented with beads and dyed horsehair (it will be placed in front of him in a Half Moon ceremony, stood upright in a Cross Fire ceremony); a decorated rattle; a special fan, probably of eagle feathers; and an eagle bone or reed whistle. He also produces a large peyote button to be the Chief Peyote, which he places on the moon

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[46] The term "roadman" or "road chief" refers to the spiritual leader of a Church ceremony, an elder who usually has a long association and intimate familiarity with the ritualistic aspects of the peyote ceremony. See, e.g., Pascarosa, Paul, M.D., and Sanfrod Futterman, "Ethnopsychedelic Therapy for Alcoholics: Observations in the Peyote Ritual of the Native American Church", 8(3) Journal of Psychedelic Drugs 215, 216 (1976).

altar. He also brings forth a sack of peyote buttons and usually a container of peyote tea to be consumed during the night, and, in the case of a Half Moon ceremony, two sacks of Bull Durham tobacco and papers or corn husks for the prayer cigarettes.

The cedarman throws a quantity of cedar on the fire, producing a dense aromatic smoke, and all the ritual objects, including the drum, are passed through this smoke in order to purify them. In the case of the Half Moon rite, the sacks of tobacco and papers are then circulated clockwise, and when all have prepared a cigarette, the roadman prays aloud and smokes his cigarette in concert with the others, who pray silently, all directing their smoke toward the fire and altar where rests the Chief Peyote. The sacks of peyote and tea are then passed clockwise around the circle, and each partakes either of tea or four buttons. The prayer and cigarettes finished and the first four peyote buttons eaten, the roadman, holding the staff and fan in one hand and vigorously shaking the rattle with the other, accompanied by the quick beat of the chief drummer, signs the ceremonial Opening Song, "Na he he he an yo witsi nai yo," syllables which go back to the Lipan Apache, to the songs of the first U.S. peyotists. He sings the hymn four times. He sings three more songs four times, and then the staff, fan, and rattle are passed clockwise to the next participant and the drum to that person's next neighbor. The person receiving the staff, fan and rattle then sings four songs four times, and passes it on the the next participant, and so the staff, rattle, fan, and drum go around the circle, each participant singing four songs four times. Before midnight, the singing continues in this way only interrupted a few times when the peyote is circulated again.

At midnight, the roadman signs another ceremonially determined song, the Midnight Water Call. Then the fireman brings a pail of water, which the cedarman passes through cedar smoke and blesses while smoking a prayer cigarette. After pouring a little on the ground "for Mother Earth," the water is passed around the circle to all participants. Today, instead of a common dipper as was used in the past, paper cups are often used. Sometime during the Midnight Ceremony, the roadman usually goes outside and blows the whistle to the four directions; this, however, is one of the more variable elements of the ceremony and may

be dispensed with or changed. At the end of the Midnight Ceremony, there is a recess lasting ten to thirty minutes when everyone goes outside to relieve himself or to stretch. It is a quiet time with little talking.

When the meeting resumes, the singing begins again and continues. One-half to two-thirds of a peyote meeting is occupied in singing. Peyote may also be circulated. At this time the participants may take from their cases their own ceremonial rattles and fans for use during singing. Also, individuals may request a prayer cigarette from the roadman, and the singing will stop while all listen to the prayer. These prayers are sometimes confessionals, sometimes testimonials, sometimes supplications for help and guidance. This is also the time for a special curing ceremony, if such has been planned.

As the first rays of sunrise appear, the roadman sings another special song, the Dawn Song. He may also blow his whistle again to the four directions. This is followed by the entrance of the peyote woman, usually the wife of the host, who brings in water which is again blessed and circulated. She also brings the ceremonial breakfast of corn, meat, and fruit, which is circulated, with each person taking a bit of each food. Following the ceremonial breakfast, the roadman may give a little talk. If this has been a Cross Fire service, the roadman may read a text from the Bible and interpret its meaning to the congregation. In full daylight the roadman sings the last of the ceremonially determined songs, the Quitting Song. Then he and the others carefully put away the ceremonial paraphernalia, wrapping the fans, rattles, and any other ceremonial objects in silk handkerchiefs and depositing them in their special boxes and cases. It is then that the meeting is over and all go outside to "welcome the sun."

Now the congregation begins to visit with one another, and the women begin preparation for breakfast. This will be the best meal that the host, assisted by his friends, can offer. There will be a good deal of talk concerning the feelings and experiences of the previous night. In the afternoon the peyotists will begin to leave for home, which for some could be a considerable distance. It is not unusual for peyotists to travel more than a hundred miles to attend a meeting.

Thus ends a typical ritual. Except for a few changes because of the circumstances of modern life and a few additions from Christian lore, the ceremony is the same as that observed by Mooney.[47/] It should be borne in mind that the roadman is expected to use his judgment in the conduct of each ceremony, and he may make some variations, such as dispensing with the eagle bone or reed whistle ceremony, or, for convenience, the fire and altar, if need be. But these are temporary, one-time variations, and all are aware of them. Anthropologists have recounted the ceremony many times, but peyotists themselves or the NAC have never fully written down the ceremony in order to study it or establish its exact form. The ritual is always learned by one man from another and by repeated attendance at many meetings for the purpose of learning how it should be done.

It should be pointed out that among peyotists their religion

[47/] Mooney, James, "The Kiowa Mescal Rite". Report of speech to the Anthropological Society of Washington. Washington, D.C. Evening Star, November 4, 1891, p. 6. Mooney was the ethnologist at the Smithsonian Institution's Bureau of American Ethnology, referred to supra.

> is more than a ritual to attend from time to time, generally about once a month. It is a part of everyday life. Peyote singing is enjoyed at home. Most peyote homes will have a peyote rattle hanging on the wall. It is easy to take it down, fashion a drum from a piece of inner tube stretched over a coffee can, and do some singing. Children use rattles and drums in play and try to imitate the peyote singing of their elders. Adults more formally practice hymns at night.[48]

The theology of peyotism, like the ritual, is rooted in the past in a belief in the supernatural origin of the sacred cactus. To all Native American Church members, peyote is a divine plant given to Indians by divine revelation; it can and does work miracles. Sven Liljeblad, an ethnologist-linguist from Idaho State University in Pocatello, eloquently described the theology of peyotism:

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[48] Stewart, pp. 328-30.

> The all-embracing view [of peyote] is that of a personal God in a monotheistic sense, and Peyote has come to the Indians to lead them to Him as Christ came to the whites. As God reveals Himself in Peyote, it becomes a sacrament whereby communion is established with Him or with the spiritual world in general. In prayers, sermons, and confessions at the meetings, there are frequent references to the Christian Trinity in terms of "Our Father" and "Our Brother Jesus" given in the vernacular, and "The Holy Ghost" given in English. As a meaningful and expressive pantheistic symbol, "Our Mother Earth" sometimes enters, all depending on the individual theory of life. Many a Peyote follower displays in private conversation a great deal of biblical knowledge. His tentative attempts at exegesis may sometimes seem strange, but no more so than the entangled conceptions in Christian scholasticism and sectarian amendments. He may take a quotation from the white man's Scriptures at its face value, and it is often amazing what he can do with it in support of his own opinion. Most people to whom Peyote affords consolation, many of whom can neither read nor write, have no need of theological proofs in matters of faith. In conformity with

traditional religious aspect, faith is sanctioned for each one according to his own means of direct revelations. Rather than being a weakness, this noncommittal attitude in confession of faith is a great strength of the Peyote religion. It satisfies any demand for denominational and even secular individual freedom. The partaker may beside his adherence to the Peyote movement be a member of any other church, or of none, and yet feel in harmony with the group.

The religious conceptions in the sphere of belief which the Peyotist applies are imperative only to the extent that they guide him in his never-ceasing search for righteousness and in his prayers for health. His piety resolves itself in ethnical norms based essentially on Christian moral values. But there is, also in his ethics, a considerable freedom of thought and conscience. In his observances, he has to take the road Peyote tells him to follow. Abstinence from alcohol occupies a prominent place in his code of mores, evidently because alcohol consumption has caused so much trouble on the reservations. Chastity and family obligations are also of great concern, apparently for similar reasons. In general, one must try hard to do one's best as a self-supporting citizen and strive to

become a respected member of the community. Friendliness and helpfulness between members of the group are much stressed. One must entertain friendly feelings toward one's neighbors and live in peace with all men. Coming as a novice to a meeting and asking the leader what to pray for, since you are neither sick nor troubled - which will surprise him greatly - would evoke the answer: "You should pray for peace, for those who are sick, and for your relatives." Consideration for other persons' problems justifies the Peyotist in disclosing his own grievances to other members of the group. Personal worries and shortcomings may be confessed. A statement during the testimonial period of a meeting may end with an appeal for moral support. Desire to help and to be helped in conforming to the moral standard of the group has a psychotherapeutic function which certainly comes to actual want in the present time of frequent individual maladjustment among the reservation people.

Yet the curative power of Peyote is the vital point. Presumably most converts join for this reason. By following the Peyote Road, health and advanced age would be secured. In most cases, a meeting is sponsored by a person troubled about his health or a case of illness in his family. He appointed the leader and defrays the cost. The Indians themselves may refer to the Peyote cactus as a medicine. But to them "medicine" is not merely a pharmaceutical product of the kind bought in drugstores. In their language there are two ways of verbalizing the notion of medicine, and both may be applied to Peyote. One of these terms refers collectively to the great and varied number of botanical items which the Indians have used therapeutically for colds, rheumatism, sore eyes, toothaches, and for all kinds of ailments, and most of which are known and used in modern pharmacology. The other term refers to something much more subtle which even a very intelligent speaker of the language has a hard time defining. And no wonder, since it leads straight into mysticism. White writers have tried to catch the underlying idea with such contradictory terms as "medicine," "supernatural power," and "the Great Spirit," none of which is sufficiently significant to cover the meaning. It may refer to an immaterial force which manifests itself in Nature's realm. The healing Peyote is conceived by the great majority as a divine panacea and by the sophisticated few as spiritual power of healing

> through mental effort. While Peyote ethics are saturated with Christian ideology and represent the acceptance of new social values, the rituals which remain the core of the cult are entirely native. The number of ceremonial elements, except for the spoken word, to which a Christian meaning may be attributed is limited to one: the cross on the Peyote drum.[49]

The Peyotist ethical code constitutes a way of life called "The Road." The code has four main parts:

a. Brotherly Love. Members should be honest, truthful, friendly, and helpful to one another.

b. Care of Family. Married people should not engage in extra-marital affairs, and should cherish and care for one another, and their children. Money should be spent on the family as a whole instead of selfishly.

c. Self-Reliance. Members should work steadily and reliably at their jobs and earn their own living.

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[49] Liljeblad, Sven, The Idaho Indians in Transition, 1805-1960 (1972) Special Publication, Pocatello: Idaho State University.

d. Avoidance of Alcohol.
Peyote and alcohol are not to be mixed.[50]

B. Beneficial Effects Of Peyotism And Peyote Use

The State attempts to support its claim of a "compelling public health and safety interest" in prohibiting possession of peyote for Native American Church ceremonial use by reference to the "public and private devastations caused by drug use and abuse in this nation." State Brief at 14. Reference is also made to President Reagan's proposed "Drug-Free America Act of 1986", and to the "Anti-Drug Abuse Act of 1986", enacted by the 99th Congress. Pub.L.No. 99-570, 100 Stat. 3207. State Brief at 14-15.[51]

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[50] Quoted from The Native American Church of North America membership card (emphasis added).

[51] Of the $1.7 billion appropriated in 1986 under the Anti-Drug Abuse Act, Congress allocated $12.7 million to the (Cont. on next page)

It then goes well beyond the record in this case and attempts to plant the impression in the Court's mind that peyote use by Native American Church members can cause "toxic acute brain syndrome, . . . a clouding of consciousness, and convulsions, as well as death or respiratory failure. . . ." State Brief at 16. All to support its contention that:

> A state's interest in regulating peyote use, therefore, must be deemed as weighty as its broader

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[51](Cont.) Indian Health Service for funding substance abuse and prevention and treatment programs for Indian communities, nearly doubling previous IHS alcoholism and drug abuse allocations. Sections 4201-4230 of Pub. L. 99-570, 100 Stat. 3207-137 through 3207-152, entitled the "Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986", sets forth the means for developing a "comprehensive, coordinated attack upon the illegal narcotics traffic in Indian country and the deleterious impact of alcohol and substance abuse upon Indian tribes and their members." See §4203, 100 Stat. 3207-138.

> interest in drug control. . . . Indeed, perhaps no other activity so classically is a proper object of government's regulatory power. . . . Oregon's interest in the prohibition of peyote use and possession therefore cannot be characterized as anything less than compelling.

State Brief at 16.

The State's argument amounts to little more than thinly-veiled governmental arrogance.[52/] First, it attempts to capture the attention of the Court by reference to the national problem of chemical substance abuse, which amici agree has reached epidemic proportions, even among American Indian populations. But the evidence in this case, uncontroverted by the State, demonstrates the positive therapeutic and rehabilitative effects of peyote use in the controlled setting of a Native American Church ceremony. See, Smith Rec., Exh. 7, Aff. of Terence Gorski, Robert Bergman, Omer C. Stewart, Stanley Smart and Emerson Jackson.

Second, the State relies on a series of reference materials concerning drug abuse, not a part of the record below, which do not refer to peyote use by members of the Native American Church. See, esp., State Brief at 15-16, 20, nn. 5-13, 20. This obvious attempt to mischaracterize non-record evidence casts a pall on the legitimate, therapeutic use of peyote in a ceremonial setting, and must not be tolerated by the Court.

[52/] The only "arrogance" at play here is within the State Attorney General's Office. The Oregon legislature in 1977 delegated to the Oregon Board of Pharmacy the task of establishing schedules of controlled substances. Oregon Laws 1977, Ch. 745, §5; Or. Rev. Stat. §475.035 (1985). As the State recognizes, this Fall the Board, at the request of Respondent Al Smith, will take up the matter of exempting Native American Church peyote use from the list of Schedule I controlled substances. See State Brief at 21-22, n. 22.

Indeed, if the Court is at all concerned about the sufficiency of evidence, notwithstanding the extensive records made by the parties in People v. Woody, 394 P.2d 813 (Calif. 1964), and State v. Whittingham, 504 P.2d 950 (Ariz. 1973), or that put on by Respondent Smith here (Smith Rec., Ex. 7), the proper course would be to remand for further factual findings.[53]

Amici would submit that all governments, federal, state and tribal have a compelling interest in stemming the tide of chemical substance abuse, particularly among younger generations. But the overwhelming body of physical and social scientific evidence confirms the positive therapeutic and rehabilitative

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[53] In this context amici join the argument of amicus curiae American Jewish Congress that the Writ of Certiorari in this case was improvidently granted.

effects of peyote in a Native American Church ceremonial setting, especially for Native Americans.[54] Peyotism does not foster drug abuse; it has been proven effective, from the early recorded history in this country to the present day, in controlling alcoholism and other substance abuse. In this context, then, the State of Oregon's interests lie in facilitating not obstructing the use of peyote in Native American Church ceremonies.

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[54] See, e.g., Aberle, David, The Peyote Use Among The Navajo, (Chicago 1966) ("they do not make peyote consumption a simple hedonic gratification"); Albaugh, Bernard J., and Anderson Phillip O., "Peyote In The Treatment Of Alcoholism Among American Indians", 131 Am. J. Psychiatry 1247, 1248 (1974) ("the cathartic expression of emotions and feelings is one of the major benefits of the peyote ceremony to the alcoholic"); Bergman, R.L., "Navajo Peyote Use: Its Apparent Safety", 128 Am. J. Psychiatry 695 (1971) ("in a population of over 200,000 people there were no reports of peyote abuse or dependency: it is uncommon for Indians to use peyote outside of ceremonial meetings"); Dorrance, D.L.; Janiger, O.; and Teplitz, R., "Effect Of Peyote On Human Chromosomes", 243 J. A.M.A. 299-302 (1975) (chromosomal study of Indians with a life-long history, and a 1600-year cultural tradition of peyote ingestion, failed to reveal any increase in abnormalities); Pascarosa, P. and Futterman, S., "Ethnopsychedelic Therapy For Alcoholics: Observations In The Peyote Ritual Of The Native American Church", supra.

CONCLUSION

The decision of the Oregon Supreme Court below should be affirmed.

Respectfully submitted,

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July, 1987

AMICUS CURIAE

BRIEF

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No. 86-946, No. 86-947

Supreme Court, U.S.
FILED
JUL 29 1987
F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1987

EMPLOYMENT DIVISION, DEPARTMENT OF HUMAN RESOURCES OF THE STATE OF OREGON, RAY THORNE, Administrator,

Petitioner,

v.

ALFRED L. SMITH,

Respondent.

EMPLOYMENT DIVISION, DEPARTMENT OF HUMAN RESOURCES OF THE STATE OF OREGON, RAY THORNE, Administrator,

Petitioner,

v.

GALEN W. BLACK,

Respondent.

BRIEF *AMICI CURIAE* OF THE AMERICAN JEWISH CONGRESS ON BEHALF OF ITSELF AND THE SYNAGOGUE COUNCIL OF AMERICA IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICUS

The American Jewish Congress is an organization of American Jews founded in 1918 to protect the civil, economic and political rights of American Jews and all Americans. It is committed to the preservation of the great freedoms secured by the First Amendment to the Constitution, especially the rights secured by the Establishment and Free Exercise Clauses. To further these ends, AJCongress has filed briefs *amicus curiae* in numerous cases in state and federal courts in which the meaning of the religion clauses has been at issue.

As an organization representing a religious minority, AJCongress is concerned that the power of government not be used arbitrarily to suppress easily accommodated free exercise of religion. In particular, AJCongress seeks to ensure that the religious practices of minority religions are not burdened or prohibited absent compelling justification.

The Synagogue Council of America is a co-ordinating body consisting of the organizations representing the three divisions of Jewish religious life: Orthodox, Conservative and Reform. It is composed of: Central Conference of American Rabbis, representing the Reform Rabbinate; Rabbinical Assembly, representing the Conservative Rabbinate; Rabbinical Counsel of America, representing the Orthodox Rabbinate; Union of American Hebrew Congregations, representing the Reform Congregations; Union of Orthodox Jewish Congregations of America, representing the Orthodox

Congregations; and United Synagogue of America, representing the Conservative Congregations.

This brief is submitted with the consent of the parties.

SUMMARY OF ARGUMENT

1. Respondents are members of the Native American Church. Because they believe peyote--a cactus plant containing the hallucinogen mescaline--is a sacrament, they felt obligated to use it at a religious ceremony. They lost their jobs because this religious practice conflicted with a job requirement. The State of Oregon then characterized their adherence to religious doctrine as "misconduct in connection with work," and declared them ineligible for unemployment compensation benefits.

In Sherbert v. Verner, Thomas v. Review Board, and Hobbie v. Unemployment Appeals Commission, this Court held that, absent compelling justification, a State cannot deny unemployment compensation benefits to individuals forced to leave their jobs because their religious precepts conflict with a job requirement. Respondents, just like the plaintiffs in Sherbert, Thomas and Hobbie, acted in furtherance of their sincerely held religious beliefs, and, just like those plaintiffs, were penalized by the State for doing so. No distinction can be drawn between the burden placed on respondents and the burdens imposed on the plaintiffs in the Sherbert line of cases.

2. The only difference between these cases and the earlier ones rests in the State's reason for penalizing respondents. Earlier in these proceedings the State had claimed that it had a compelling interest in protecting its unemployment compensation fund from dilution. Recognizing the frailty of this interest, the State's attorneys have invented a new one: the State now purportedly has an interest in refusing

to subsidize behavior it has otherwise made illegal.

Compelling interest analysis demands that the state interest that is to be balanced against the individual interest be real, not imaginary. But here, the State of Oregon has renounced the very interest its attorneys now advance.

The Oregon Unemployment Insurance Law is designed to protect the unemployed and their families. The Oregon courts have held that an individual who is fired because he has committed a crime is entitled to benefits under the statute if the crime does not constitute work-related misconduct, or if certain other statutory conditions, not present here, are not met. Thus, contrary to what the State's attorneys now claim, ordinarily the State does subsidize individuals who have committed a crime, even when that illegal conduct is not religiously compelled.

In light of this, the State's asserted interest in refusing benefits to these respondents, whose use of peyote was religiously compelled, solely because their use *may* have been illegal, is worse than imaginary--it is flatly contradicted by the legislation itself.

3. Even if the State of Oregon truly had an interest in denying benefits to respondents because they used peyote, it would still be incumbent on the State to prove not only a compelling interest in prohibiting peyote in general, but also that it could not exempt Native American Church members without substantially impairing that interest.

The State argues, for the first time before this Court, that peyote use is so dangerous, it must be absolutely banned lest the health and safety of its citizens be jeopardized. This argument was not made nor was any evidence introduced to support it in any of the proceedings below. It therefore is not properly before this Court. Moreover, serious due process concerns are implicated by the State's introduction, at this late juncture, of tidbits of information about peyote use since respondents have never had an opportunity to challenge this "evidence" in a fact-finding proceeding.

The only evidence properly before this Court on the effects of peyote are the affidavits introduced by respondent Smith at his hearing, which convincingly demonstrate that the religious use of peyote is beneficial to members of the Native American Church.

4. If ceremonial peyote use truly was inevitably harmful, it is likely that all jurisdictions would ban it. Yet the

opposite is true. The federal government has exempted religious peyote use from its drug laws for more than 25 years, and explicitly protects that use in the American Indian Religious Freedom Act of 1978. Sixteen states, where the Native American Indian population is centered, have similar statutory or judicial exemptions; even Oregon's Court of Appeals has indicated that in light of the strong federal policy protecting Native American religious peyote use, its prior refusal to grant an exemption must be reconsidered.

That so many jurisdictions have successfully carved out an exemption to protect the central religious practice of a minority religion casts grave doubts on the State of Oregon's predictions about the dire consequences to its populace were a similar exemption granted.

5. The State also contends that were it

to allow peyote use by Native American Church members, it would be forced to exempt all religious use of all drugs, thus undermining its entire drug enforcement scheme. This all-or-nothing argument misconceives the nature of an accommodation mandated by the Free Exercise Clause. When an entire religion is in effect outlawed by a governmental rule or policy, a request for an exemption involves a careful balancing of this danger against the precise harm to the state's interest if an exemption were granted.

Peyote is more than a sacrament of the Native American religion--it is the basis of the religion itself. If the religious practice is prohibited, the religion dies. No graver danger can be imagined.

In contrast, the State's interests would not be seriously impaired were an exemption extended. Since the Native American Church carefully controls use of peyote--use outside of a religious ceremony is sacrilegious--the potential for abuse is limited. And since peyote is so unpleasant tasting (and possibly for this reason its use is rare in this country), it is highly unlikely that many people would fake religious belief to qualify for a religious exemption.

Peyote use by the Native American Church is, as the United States Congress has recognized, _sui_ _generis_. The balance struck between the two competing interests is not likely to be duplicated by any other religion or any other drug use.

6. Whether peyote use by Native American Church members is protected by the Free Exercise Clause is a difficult constitutional question. Yet the record in this case contains virtually no

evidence on peyote use in general, on its use by Native American Church members, on its physiological effects, or on the experience of jurisdictions that have granted a religious exemption. Since evidence on these issues is critical to a fair determination of this most delicate constitutional question, the writ of certiorari should be dismissed as improvidently granted.

POINT I

THESE CASES ARE CONTROLLED BY SHERBERT v. VERNER, THOMAS v. REVIEW BOARD and HOBBIE V. UNEMPLOYMENT APPEALS COMMISSION

As members of the Native American Church, respondents Alfred L. Smith and Galen W. Black ("respondents") were unable to comply with their employer's requirement that they totally abstain from the use of mind-altering drugs. To do so, they would have to renounce their church's most sacred practice--the ritual use of peyote.

Peyote, a cactus plant that contains the hallucinogen mescaline, is a sacrament of the Native American Church, and respondents, active members of their Church, felt obligated to participate in a religious ceremony involving the ingestion of peyote. When they informed their employer, the Douglas County Council on Alcohol and Drug Abuse Prevention and Treatment ("ADAPT"), that they had used peyote at a religious ceremony, they were discharged for violating ADAPT's alleged policy prohibiting even the religious use of certain drugs.

The State of Oregon then sought to impose an additional burden on respondents. That burden was indirect -- respondents were not prosecuted for their religious use of peyote. Rather, the

State denied them unemployment compensation benefits on the ground that they had been "discharged for misconduct connected with work." But, as this Court has recognized time and time again, most recently in Hobbie v. Unemployment Appeals Commission, 107 S.Ct. 1046 (1987), such indirect penalties on religious practices are no less coercive for the individual faced with the choice of following his religion or complying with a work rule, and are no less subject to the dictates of the Free Exercise Clause.

A. The State Burdens Religion When it Denies Unemployment Benefits Because of Conduct Mandated by Religious Belief

For more than twenty years, this Court has adhered to the constitutional principle first announced in Sherbert v. Verner, 374 U.S. 398 (1963), then embraced again in Thomas v. Review Board, 450 U.S. 707 (1981), and in Hobbie v. Unemployment Appeals Commission, 107 S.Ct. 1046 (1987): a state places an intolerable burden on the free exercise of religion when it denies unemployment benefits to an individual who has lost a job after refusing to comply with a job requirement that conflicts with the individual's religious precepts.[1]

In Sherbert, a Seventh Day Adventist, fired for refusing to work on the Sabbath, was unable to obtain other work because her religious beliefs prohibited work on Saturdays. The State denied her unemployment benefits because she "failed, without good cause...to accept...suitable work when offered." 374 U.S. at 401.

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[1] The state may be able to justify the burden on religion by demonstrating a compelling interest. The State of Oregon has not made this showing. (See Points II and III, infra).

The Court held that the denial of benefits infringed the plaintiff's free exercise rights. She was being forced:

> to choose between following the precepts of her religion and forfeiting benefits on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against [the plaintiff] for her Saturday worship.

Id. at 404.

In Thomas, decided eighteen years later, a Jehovah's Witness who had a religious basis for not participating in weapons production, resigned after he was transferred to a department that was directly engaged in such production. He, too, was denied unemployment benefits on the ground that his termination was not based on "good cause [arising] in connection with [his] work." 450 U.S. at 712. And, once again, the Court, recognizing the "coercive impact" on the plaintiff, held that his free exercise rights had been violated. Id. at 717.

Just last Term, this Court reaffirmed both Sherbert and Thomas. In Hobbie, the plaintiff joined the Seventh Day Adventist Church several years after she began work for a jewelry store. She advised her employer that she would no longer be able to work on Friday night or Saturdays, the time of the heaviest sales. She was fired, and like repondents here, was denied benefits pursuant to a state statute authorizing disqualification when a claimant was discharged for "misconduct connected with ...work." 107 S.Ct. at 1048.

Seeing "no meaningful distinction among the situations of Sherbert, Thomas and Hobbie," the Court, for the third time in twenty-four years, reaffirmed that:

> "Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial."

Hobbie, 107 S.Ct. at 1049 (emphasis in original), quoting Thomas, 450 U.S. at 717-718.

B. There Is No Meaningful Distinction Between These Cases and Sherbert, Thomas and Hobbie

The burden imposed on respondents in these cases is no different from that imposed on the plaintiffs in Sherbert, Thomas and Hobbie. Just as in those cases, respondents' religiously motivated behavior led to their dismissal; the State then further penalized them by denying them benefits.

The State, however, has labelled as "decisive" a distinction it has only now observed between those cases and these. According to the State, in the earlier cases the employees acted passively and in good faith observance of their religious beliefs whereas here the respondents "insisted on actively violating" their employer's work rules "in a way that threatened directly to undermine the employer's very purpose." (State Brief at 25).

This so-called distinction borders on the frivolous. Respondents, no less than the plaintiffs in the earlier cases, acted in good faith and in furtherance of their sincerely held religious beliefs.[2] Those beliefs conflicted with a work requirement--precisely the scenario in Hobbie.

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[2] ADAPT may have acted illegally in firing respondents. After the EEOC found reasonable cause to believe that ADAPT violated Title VII of the 1964 Civil Rights Act, ADAPT, without admitting to a violation, agreed to "eliminate any

In Hobbie, the plaintiff knew, when she was hired, she would have to work on Friday night and Saturday, the time of heaviest sales; she agreed to those terms.[3] She nevertheless "directly violated" those terms by refusing to work on the Sabbath and, as the State says of respondents, thereby "actively interfered with [her] employer's legitimate interests in a way that directly threatened to undermine the

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discipline against members of the Native American Church for the non-drug sacramental use of peyote during a bona fide ceremony." EEOC v. Douglas County Council, Civil No. C85-6139-E (D. Or. 1986). This Court can take judicial notice of these facts. F.R.Ev. 201(b)(2). See also Green v. Warden, 699 F.2d 364, 369 (7th Cir.), cert. denied, 461 U.S. 960 (1983) (appeals court can judicially notice other court proceedings); Hart v. Commissioner, 730 F.2d 1206, 1207 n.4 (8th Cir. 1984).

[3] See Brief for the United States in Hobbie as Amicus Curiae at 2-3.

employer's business objectives." (State Brief at 25-26).

The Sherbert trilogy recognizes that sometimes unavoidable conflicts arise between a legitimate job requirement and an employee's religious beliefs; the State cannot pressure the employee to violate those beliefs by threatening him with loss of unemployment benefits if he chooses to follow his conscience rather than the job requirement. That choice cannot be characterized as "active misconduct," the label the State asks this Court to pin on respondents. (State Brief at 26).

In Hobbie, the plaintiff's adherence to her religious precepts was characterized by Florida as "misconduct connected with...work," defined as a "willful...disregard of an employer's interests...in deliberate violation or disregard of standards of behavior which the employer has the right to expect of his employee." 107 S.Ct. at 1048 n.3.

Respondents, too, were charged with "misconduct connected with work," Or. Rev. Stat. §657.176(2)(a), defined in virtually identical terms as a:

> wilful violation of the standards of behavior which an employer has the right to expect of an employee. An act that amounts to a wilful disregard of an employer's interest...is misconduct.

Or. Admin. Rule 471-30-038(3) (1986).[4]

The State cannot avoid Sherbert, Thomas and Hobbie. Those cases plainly control respondents' claims.

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[4] The Oregon scheme, moreover, creates a "mechanism for individualized exemptions." Bowen v. Roy, 106 S.Ct. 2147, 2156 (1986) (Burger, C. J.) The statute has a "good cause" exemption, Or. Rev. Stat. § 657.176 (2)(c)(d)(e), and excludes from the definition of misconduct "isolated instances of poor judgment, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of

POINT II

THE STATE CANNOT ASSERT A COMPELLING INTEREST IN DENYING UNEMPLOYMENT BENEFITS SOLELY BECAUSE A CLAIMANT MAY HAVE COMMITTED A CRIME

The only thing that is different about these cases is the interest the State offers as its justification for denying respondents' benefits. The State, whose lawyers have been in search of an interest some court might label "compelling" since these cases began, had earlier in the proceedings rested on its financial interest in protecting the integrity of its unemployment compensation fund.[5] It no longer

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job skills or experience." Or. Adm. Rule 471-30-038(3). The Oregon courts have allowed benefits to individuals who were fired or who resigned for personal reasons. E.g., Christensen v. Employment Division, 66 Or. App. 309; 673 P.2d 1379 (1984) (fired for alcoholism); Sothras v. Employment Division, 48 Or. App. 69, 616 P.2d 524 (1980) (rape victim resigned).

[5] See the State's Brief to the Oregon Court of Appeals in Black at 15; and in Smith at 11-12.

asserts that interest--in light, no doubt, of Hobbie. Instead, its lawyers now assert that Oregon could constitutionally deny respondents' benefits because peyote use allegedly is illegal in Oregon. (*But see* Respondents' Brief refuting this claim).

Unquestionably, a state has an interest in seeing its criminal laws obeyed. But here, the Oregon legislature has explicitly disavowed any interest in making the commission of a crime *per se* grounds for disqualification. The State's attorneys therefore have raised not a compelling interest, but an imaginary or theoretical one that cannot justify the burden imposed on respondents' free exercise rights.

A. The State Must Demonstrate a Compelling Interest

Government cannot place a burden on religious liberty unless it "is essential to accomplish an overriding governmental interest." United States v. Lee, 455 U.S. 252, 257-258 (1982). This Court has described that interest as "compelling"[6] or "especially important"[7] and has recognized that "no showing merely of a rational relationship to some colorable state interest [will] suffice." Sherbert, 374 U.S. at 406.

And, in Wisconsin v. Yoder, 406 U.S. 205, 215 (1972), then Chief Justice Burger summarized the Court's free exercise jurisprudence as follows:

> [t]he essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.

While the words may differ, the import is clear: government cannot rely on imaginary or theoretical interests when its laws infringe on an individual's most basic right to religious liberty. "Only an especially important governmental interest pursued by narrowly tailored means can justify exacting a sacrifice of First Amendment freedoms..." Bowen v. Roy, 106 S.Ct. at 2167 (O'Connor, J.).

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[6] Thomas v. Review Board, 450 U.S. 707, 718 (1981).

[7] Bowen v. Roy, 106 S.Ct. 2147, 2167 (1986) (O'Connor, J.).

Compelling interest analysis or "balancing" is a recognition that in a constitutional democracy it is sometimes necessary for even cherished liberties to yield to other paramount state interests. But it is not a search for a magical formula which, merely by being invoked, defeats a plaintiff's claim. The interests asserted must be real, not imagined; they must reflect a considered determination by the people or their democratically chosen representatives that a particular program demands uniformity. And there must be an evidentiary showing of a close relationship between the ultimate goal of the program and the means chosen to implement it.[8]

The interests Oregon asserts in this Court--some for the first time--fail each of these tests. They amount to nothing more than a claim that the Free Exercise Clause cannot be judicially enforced against an unwilling state, so long as the state can formulate some reason for not doing so.

B. The State Has No Interest in Denying Benefits Solely Because Peyote Use May Be Illegal

The gist of the State's argument is that it has a compelling interest in refusing to subsidize behavior it has otherwise made illegal. (State Brief at 24). One thing is very clear, however.

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[8] Cf. Wygant v. Jackson Board of Education, 106 S.Ct 1842, 1850 n. 6 (1986).

Respondents in this case were _not_ denied benefits because their use of peyote may have been illegal. Rather, they were disqualified because they chose to ingest the peyote even though it purportedly violated their employer's work rules.[9]

But because possession of peyote, at least at the moment, is illegal in Oregon (_but see_ Point III, _infra_), the State now asserts that it can rely on an interest unrelated to its Unemployment Insurance Law, even though that interest is utterly at war with the legislation itself and its purpose of providing a minimum level of subsistence to unemployed workers and their families.

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[9] If respondents had been fired for drinking a small amount of sacramental wine, they would also have been "discharged for misconduct connected with work," since, as ADAPT's executive director admitted, it "would have taken the same action had [the respondents] consumed wine at a Catholic ceremony." _Employment Division v. Black_, 301 Or. 221, 223, 721 P.2d 451, 452 (1986). _See_, to the same effect, _Smith_ Transcript at pp. 37, 34.

This Court should "not...accept at face value assertions of legislative [interest], when an examination of the legislative scheme and its history demonstrates that the asserted [interest] cannot have been a goal of the legislation." Weinberger v. Weisenfeld, 420 U.S. 636, 648 n.16 (1975).[10]

And an examination of Oregon's "legislative scheme" plainly reveals that the Oregon legislature, contrary to what the State now claims, chose not to make the commission of a crime by itself sufficient grounds for disqualification of benefits. The interest invented by the State's attorneys would frustrate the very social welfare purpose motivating the Unemployment Insurance Law.

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[10] See Minnesota v. Clover Leaf Creamery, 449 U.S. 456, 463 n.7 (1981). See also, Mississippi University for Women v. Hogan, 458 U.S. 718, 728 (1982); Califano v. Goldfarb, 430 U.S. 199, 213 (1977). When something as fundamental as religious liberty is at stake, this Court should not depart from this well-established practice and give overriding weight to a State's recitation of an interest which "though conceivable ...[was] not actually considered by the relevant decision-maker." Tribe, American Constitutional Law, §12-8 at p. 602 (1977).

Although the Oregon law does have a provision addressing an employee's commission of a crime, the Oregon Supreme Court held that this provision did not apply to respondents[11] and the State could not claim now that it does.[12]

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[11] Smith v. Employment Division, 301 Or. 209, 219 n.3, 721 P.2d 445, 450-451 n.3 (1986).

[12] The statute provides for cancellation of benefits, after certain notice provisions are followed, if "an individual was discharged for misconduct because of the individual's commission of a felony or theft in connection with the individual's work," provided there has been either a conviction or an admission to the adminstrative agency. Or. Rev. Stat. §657.176(3).

The only relevant provision therefore is Or. Rev. Stat. §657.176(2)(a), addressing work related "misconduct."

In Giese v. Employment Division, 27 Or. App. 929, 557 P.2d 1354 (1976), however, the Court of Appeals held that this provision did not apply to a university professor, who was discharged after he was convicted of conspiring to destroy federal buildings by setting off explosives. Even though he committed a crime, that alone was not sufficient grounds for disqualification since it "was conduct off the working premises and outside the course and scope of claimant's employment." 557 P.2d at 1356. See also Hoard v. Employment Division, 72 Or. App. 688, 696 P.2d 1168 (1985) (driver issued a ticket for failing to stop at red light not disqualified *per se*).[13]

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[13] Many states agree that the mere

The Oregon legislature could have enacted a broader statute, disqualifying all individuals who are fired for committing a crime. Other states have done so.[14] The State then could credibly claim that its legislature had evidenced a strong state interest in refusing compensation to individuals who have violated the law.

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commission of a crime does not justify the denial of benefits. See, e.g., Nelson v. Department of Employment Security, 98 Wash. 2d 370, 655 P.2d 242 (1982) (cashier convicted of shoplifting); Przekaza v. Department of Employment Security, 136 Vt. 355, 392 A.2d 421 (Vt. 1978) (driver for county mental health service convicted of driving while intoxicated); Weaver v. Wallace, 565 S.W.2d 867 (Tenn. 1978) (fork lift operator convicted for marijuana possession).

[14] See, e.g., Unemployment Compensation Board v. Ostrander, 21 Pa. Comm. 583, 347 A.2d 351 (1975) (statute limiting benefits only when claimants "became unemployed through no fault of their own" construed to deny benefits whenever claimant fired for conviction of a crime).

But this is precisely the interest the Oregon legislature has rejected in favor of providing assistance to the unemployed.[15]

POINT III

THE STATE HAS NOT SHOWN THAT EXEMPTING PEYOTE USE BY NATIVE AMERICAN CHURCH MEMBERS WOULD SUBSTANTIALLY HARM A COMPELLING STATE INTEREST

Even if the State of Oregon truly had an interest in denying unemployment benefits to individuals fired from their jobs for using an illegal drug, it would still have to demonstrate that its interest in prohibiting that drug would be significantly harmed were the individual's religious beliefs accommodated.

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[15] The Oregon Supreme Court held that "the state's interest in denying unemployment benefits to a claimant discharged for religiously motivated misconduct must be found in the unemployment compensation statutes, not in the criminal statutes proscribing the use of peyote." Smith v. Employment Division, 301 Or. 209, 219, 721 P.2d 445, 450 (1986). This finds support in Sherbert, where the Court looked for a "compelling state interest enforced in the eligibility provisions of the [state] statute." 374 U.S. at 406. Nevertheless, this Court need not decide whether a state can ever justify the burden a statute places on religious liberty by reference to another unrelated statute since here the statutory scheme conflicts with the state's asserted interest.

The State, still in search of a compelling interest, now argues that it must prohibit even the religious use of peyote in order to protect the public from a threat to its "health and safety." (State Brief at 14-16). Phrased so broadly, this very general interest appears more weighty than the narrow interest two adherents of a minority religion have in receiving unemployment benefits. The State, however, also has a general but no doubt equally significant interest in preserving religious liberty. And "for a balancing test to make any sense, relatively equal levels of generality or abstraction must be chosen for each side of the balance." Pepper, Taking the Free Exercise Clause Seriously, 2 B.Y.U.L. Rev. 299, 310 (1986).

This Court, embracing this reasoning, has not permitted a state to rest on an assertion of a general interest when confronting a free exercise claim for accommodation. Rather, even when government has shown that "an especially important" interest is at stake, it must still show that "unbending application of its regulation to the religious objector" is essential to prevent substantial harm to that interest.[16]

This Court has not hesitated to apply this searching analysis when confronting a state interest of undeniable importance. In Wisconsin v. Yoder, 406 U.S. 205 (1972), the Court agreed that the State of Wisconsin had a strong interest in enforcing its compulsory education laws. "Providing public schools stands at the very apex of the function of a state." Id at 213. But it rejected the argument that this general interest was so compelling it was absolute:

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[16] Bowen v. Roy, 106 S.Ct. at 2166-2167 (1986) (O'Connor, J.).

> Where fundamental claims of religious freedom are at stake, however, we cannot accept such a sweeping claim; despite its admitted validity in the generality of cases, we must searchingly examine the interests that the State seeks to promote by its requirement for compulsory education to age 16, and the impediment to those objectives that would flow from recognizing the claimed Amish exemption.

Id at 221.

In Yoder, the Court concluded that the State had not shown with sufficient "particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish." Id at 236. The State of Oregon fares no better since it too has failed to demonstrate with "particularity" how its interest in the "health and safety" of its citizens would be "adversely affected by granting an exemption" to the Native American Church.[17]

A. The State Has Not Proven Accommodation Would Significantly Endanger the Welfare of its Citizens

The State contends that peyote use poses a substantial threat to the health and safety of its citizens; it then, for the first time in these proceedings, claims that this "health and safety" interest requires no less than a "blanket prohibition on peyote use." (State Brief at 17).

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[17] The State halfheartedly suggests that because peyote is illegal, this burden need not be met--that when a state has criminalized certain behavior First Amendment protection is withdrawn. (State Brief at 11-12). Yoder, involving a criminal statute, conclusively refutes this claim.

1. The State cannot rely on evidence not introduced below

The only "evidence" the State has introduced to support this claim is isolated statements appearing in two books and a few articles that discuss the physiological effects of peyote. (State Brief at 14-16) None of this "evidence" was introduced in any of the proceedings below.

The State chose not to participate at the hearings held before the referee to review the initial denial of benefits. The State also chose not to respond to the affidavits submitted by respondent Smith after his hearing on the ritualistic use of peyote by Native American Church members and on peyote's beneficial effect on drug and alcohol rehabilitation.[18]

At the Oregon Court of Appeals, the State argued that it had a compelling interest in protecting the unemployment fund from depletion, and, in Smith, but not in Black, that, since peyote use was illegal, it was constitutionally unprotected.[19] It did not argue that peyote use is so dangerous, a blanket prohibition is justifiable. The State repeated the same arguments before the Oregon Supreme Court, again failing to offer for testing in the adversarial process any materials on what peyote is, on what it does, or on its purported dangerousness.

Had the State introduced any of this "evidence" at the administrative level, respondents would have had the opportunity to challenge it. Even if introduced at the state judicial level, a remand could have been ordered.[20] In either case, a fuller factual record would have been developed. Instead, the State deliberately waited until its final appeal before this Court to advance the argument that a blanket prohibition is necessary and to cite to any "evidence" to support it.

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[18] See Exhibit 7 to Smith transcript.

[19] Brief in Black at 15; in Smith at 11-12, 13-15.

Arguments or "evidence" not part of the record below are not properly before this Court, which "must affirm or reverse upon the case as it appears in the record." Witters v. Washington Dept. of Services for the Blind, 106 S.Ct. 748,

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[20] The Oregon courts, which view as improper the introduction of a new issue on appeal, frequently remand for further factual development. See, e.g., Swezey v. Employment Division, 47 Or. App. 923, 615 P.2d 1103 (1980); Gutierrez v. Employment Division, 71 Or. App. 658, 693 P.2d 1344 (1985).

751 n.3 (1986).[21] But even if they were, the State should not be permitted to get away with this type of litigation tactic, particularly when constitutional rights of the highest stature are implicated. Withholding arguments or "evidence" until the final appellate proceeding is a practice that must be condemned.

The State's reliance on "evidence" about the harmful consequences of peyote use raises serious due process concerns. Respondents have never had notice that the State intended to make this claim, nor have they had an opportunity to fully litigate its factual basis. Yet notice and an opportunity to be heard "at a meaningful time and in a meaningful manner" are the fundamental requirements of due process. See, e.g., Matthews v. Eldridge, 424 U.S. 319 (1976).

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[21] *See also* *New Haven Inclusion Cases*, 399 U.S. 392, 450 n.66 (1970); *Russell v. Southard*, 53 U.S. (12 How.) 139, 159 (1851). *Cf.* *Granberry v. Greer*, 107 S.Ct. 1671 (1987) (state generally cannot raise non-exhaustion defense for first time on appeal).

Fundamental fairness mandates that decisions not be based on evidence not found in the record.[22] There is nothing in this record to show that the religious use of peyote by Native American Church members invariably "threatens human health." (State Brief at 17).

2. The record refutes the dangers of religious peyote use

This record does contain some evidence on whether peyote is dangerous when used as part of a religious ritual.

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[22] Goldberg v. Kelly, 397 U.S. 254, 269-271 (1970); Ohio Bell Telephone Co. v. Public Utility Commission, 301 U.S. 292 (1937); Morgan v. United States, 298 U.S. 468, 480 (1936). See generally Weinstein's Evidence §201(05) (1986) (judicial notice without opportunity to be heard can "conflict with constitutional guarantees of a fair trial").

But that evidence refutes the very contention now made by the State.

Professor Omer C. Stewart, an expert since 1938 on the use of peyote in religious ceremonies, testified at respondent Smith's hearing that "nothing has been shown to be as effective in combatting the negative effects of alcoholism as the use of peyote in an Indian religious ceremony." (Smith Tr., Exh. 7).[23]

Dr. Robert Bergman, a Clinical Associate Professor of Psychiatry and an expert on Indian health, similarly testified that the ceremonial use of peyote "is the single most effective manner of treatment for Indian alcoholism and drug abuse;" moreover, the hallucinogenic effects of peyote disappear by the time the ceremony is complete and "it is extremely rare for the use of peyote in a Native American Church ceremony to lead to...negative effects. (Smith Tr., Exh. 7).[24]

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[23] Professor Stewart has written extensively on this subject. See generally Stewart, Washo-Northern Paiute Peyotism, 63 (Univ. of Cal. Press 1944), reprinted in Stewart & Aberle, Peyotism in the West (Univ. of Utah Press 1984).

Despite this record evidence, the State equates the religious use of peyote with the religious handling of snakes and drinking of poison (State Brief at 17). Those practices are patently dangerous, as the Tennessee Supreme Court found in State ex rel Swann v. Pack, 527 S.W.2d 99 (Tenn. 1975), cert. denied, 424 U.S. 954

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[24] Dr. Bergman, who also has written extensively on ritual peyote use, has elsewhere commented on the lack of "negative reactions" to peyote use among Native American Church members. See Steiger, Medicine Power - The American Indian's Revival of his Spiritual Heritage and Its Relevance for Modern Man 196-197 (Doubleday, 1964). See also Anderson, Peyote: The Divine Cactus, 165-166 (Univ. of Ariz. 1980) (quoting Dr. Bergman as saying he had "seen almost no acute or chronic emotional disturbance arising from peyote use.")

(1976). There, the evidence indicated that at least two people died at the ceremony at issue. The snakes were handled in a "crowded church sanctuary, with virtually no safeguards, with children roaming about unattended." 527 S.W. 2d at 113.

The ceremonial use of peyote by the Native American Church, a practice condoned by many states and by the federal government for over 20 years, is not fraught with the same dangers.

3. Federal accommodation of peyote use by Native American Church members

If religious peyote use truly had the irreparable consequences the State attributes to it, it is likely that it would be uniformly banned. Yet the federal government has for many years accommodated the religious use of peyote by Native American Church members, apparently without harm to its general interest in controlling the use of hallucinogenic substances.

Congress has determined that certain drugs have a "substantial and detrimental effect on the health and general welfare of the American people," 21 U.S.C. §801(2), and accordingly has imposed severe penalties on those possessing these drugs. 21 U.S.C. §841(a). Although peyote has been included within this class of prohibited drugs since 1965,[25] and is listed as a controlled substance on Schedule I of the Controlled Substance Act, 21 U.S.C. §812(c), the Attorney General has specifically exempted its religious use by Native American Church members:

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[25] Congress first proscribed peyote in the Drug Abuse Control Amendments of 1965. 79 Stat. 226 §3(a). The legislative history reveals that Congress understood that the bona fide religious use of peyote would not be forbidden by the Amendments. See, e.g., 111 Cong. Rec. 15977 (1965). See generally Native American Church of New York v. United States, 468 F. Supp. 1247 (S.D.N.Y. 1979), aff'd mem., 633 F.2d 205 (2d Cir. 1980).

> The listing of peyote as a controlled substance in Schedule I does not apply to the nondrug use of peyote in bona fide religious ceremonies of the Native American Church, and members of the Native American Church so using peyote are exempt from registration. Any person who manufactures peyote for or distributes peyote to the Native American Church, however, is required to obtain registration annually and to comply with all other requirements of law.

21 C.F.R. § 1307.31. This exemption reflects recognition that the "Native American Church is *sui generis*" because it regards "peyote as a deity."[26]

Even more recently, in 1978, Congress enacted the American Indian Religious Freedom Act ("AIRFA"), 42

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[26] Comments of Mr. Sonnenreich of the Bureau of Narcotics and Dangerous Drugs, *Drug Abuse Control Amendments of 1970*, *Hearings before the Subcommittee on Public Health and Welfare of the Committee on Interstate and Foreign Commerce*, House of Representatives, 91st Cong., 2d Sess. 117-118 (1970).

U.S.C. §1996, which provides that:

> Henceforth, it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects and the freedom to worship through ceremonials and traditional rights. (emphasis added).

One of Congress' concerns in passing AIRFA was to protect the religious use of peyote by American Indians. 1978 U. S. Code Cong. & Ad News 1262-1264.[27] Indeed, Congress, despite its view that peyote in general poses "a health threat," explicitly praised the government's "well thought out exceptions" for members of the Native American Church. Id. at 1263.

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[27] Congress recognized that to the Indians certain substances, such as peyote, "have religious significance, because they are sacred, they have power, they heal, they are necessary to the exercise of the rites of the religion, they are necessary to the cultural integrity of the tribe, and, therefore, religious survival...." 1978 U.S. Code Cong. & Ad News at 1263.

The Oregon Court of Appeals, the same Court that refused to exempt religious peyote use in State v. Soto, 21 Or. App. 794, 537 P.2d 142 (1975), cert. denied, 424 U.S. 955 (1976), specifically noted below that:

> Soto predates the American Indian Religious Freedom Act, 42 U.S.C. § 1996. In the light of the federal legislative policy, the holding in Soto may bear reexamination.

Black v. Employment Division, 75 Or. App. 735, 744, n. 9, 707 P.2d 1274, 1280 n. 9 (1985).

The federal government has had over twenty years experience exempting religious peyote use. Yet despite its undeniably strong interest in preventing drug abuse, it has apparently found that interest to be unimpaired by a narrow exemption carved out to protect the religious freedom of a small minority.

Even if AIRFA does not preempt Oregon law,[28] this speaks powerfully to the unsupported claim by the State of Oregon that accommodation would defeat its similar interest.

4. State accommodation of peyote use by Native American Church members

The federal government is not alone in exempting Native American Church members from criminal laws prohibiting peyote use. Many states have enacted statutory exemptions.[29] Other states, faced with a free exercise defense to a criminal conviction for peyote use, have judicially crafted exemptions.[30]

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[28] Under the Supremacy Clause, U.S. Const., Art. VI, cl. 2, federal law preempts state law when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (1941). See also Hillsborough County v. Automated Medical Laboratories, Inc., 105 S.Ct 2371, 2375 (1985); Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 699 (1984). If Oregon were to criminalize the religious use of peyote by Native Americans, it would frustrate Congress' clear intent to protect that religious practice.

The State, however, contends that it need not follow the example of the federal government and its sister states --that its legislature has independently assessed the risks of peyote and has chosen to heavily sanction even its religious use. That choice, the State says, must be respected. (State Brief at 21-23).

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[29] *See, e.g.*, Ariz. Rev. Stat. Ann. §13-3402(B)(1-3) (1981); Colo. Rev. Stat. §12-22-317(3) (Supp. 1982); Iowa Code Ann. §204.204(8) (1987); Kan. Stat. Ann. 565-4116(8) (1985); La. (Stat. Ann.) Rev. Stat. §40:1032 (1986); Minn. Stat. Ann. §152.02 (West Supp. 1981); N.J.A.C. 8:65-8.12 (Supp. 1986); Nev. Rev. Stat. Ann. §453.541 (1986); N. Mex. Stat. Ann. §30-31-6(d) (Supp. 1980); S.D. Comp. Laws Ann. §34-20B-14 (17) (1977); Tex. Rev. Civ. Stat. Ann., art. 4476-15 §4-11(a) (Vernon Supp. 1982-1983); Wis. Stat. Ann. §161.115 (1974); Wyo. Stat. Ann. §35-7-1044 (1977). *See also* Mont. Rev. Code Ann. §94-35-123 (1947), overturning *State v. Big Sheep*, 75 Mont. 219, 243 P. 1067 (1926). Significantly, according to the 1980 Census, these states, plus California and Oklahoma, which have judicial exemptions, account for 65% of the Native American Indian population. Table 62, General Population Characteristics, United States Census, 1980.

[30] *See, e.g.*, *People v. Woody*, 61 Cal. 2d 716, 40 Cal. Rptr. 69, 394 P.2d 813 (1964); *State v. Whittingham*, 19 Ariz. App. 27, 504 P.2d 950 (1973) (for all bona fide peyotist religions); *Whitehorn v. State*, 561 P.2d 539 (Okla.

We would agree that Oregon is not, as a matter of general principle, obligated to reach the same conclusions as other jurisdictions on the propriety of every sought after religious exemption.[31] But, as the State concedes, the Oregon legislature has not actually made the determination attributed to it. (State Brief at 21-22 at n.22). Not only is there no evidence

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Crim. App. 1977). But see State v. Bullard, 207 N.C. 599, 148 S.E.2d 565 (1967) (question of religious sincerity).

[31] This Court, however, has looked at how other jurisdictions handle religious accommodation. See Yoder, 406 U.S. at 236 n.23; Sherbert, 374 U.S. at 407 n.7.

that the Oregon legislature ever considered this issue, the authority to establish what drugs should be prohibited and what exemptions should be granted has been delegated to the Oregon Board of Pharmacy, Or. Rev. Stat. §475.035 (1985), which recently has adopted a proposed rule incorporating the federal exemption.

Moreover, that so many jurisdictions have determined that the welfare of their citizens would not be impaired were they to allow Native American Church members to engage in the "theological heart" of their religion, Woody, 394 P.2d at 818, casts grave doubts on Oregon's predictions about the dire consequences to its populace were a similar exemption extended.

Justice Tobriner, writing for the California Supreme Court in Woody, eloquently summarized the competing concerns facing any state asked to exempt religious peyote use from its criminal laws:

> We know that some will urge that it is more important to subserve the rigorous enforcement of the narcotic laws than to carve out of them an exception for a few believers in a strange faith. They will say that the exception may produce problems of enforcement and that the dictate of the state must overcome the beliefs of a minority of Indians. But the problems of enforcement here do not inherently differ from those of other situations which call for the detection of fraud. On the other hand, the right to free religious expression embodies a precious heritage of our history. In a mass society, which presses at every point toward conformity, the protection of a self-expression, however unique, of the individual and the group becomes ever more important. The varying currents of the subcultures that flow into the mainstream of our national life give it depth and beauty. We preserve a greater value than an ancient tradition when we protect the rights of the Indians who honestly practiced an old religion in using peyote one night at a meeting in a desert hogan near Needles, California.

394 P.2d at 821-822

B. The State Has Not Proven Accommodation Would Significantly Impede Drug Enforcement

The State offers a second reason why it should not be required to accommodate peyote use by Native American Church members. It contends that its "entire scheme of regulating dangerous drugs" would be crippled because it would be forced to exempt "all religious drug use." (State Brief at 18).

This argument misconceives the nature of a religious accommodation mandated by the Free Exercise Clause. Granting a narrowly drawn exemption to a particular religion because of its unique circumstances does not necessarily require an exemption for all religions that do not share those circumstances.[32] Rather, when an entire religion is in effect outlawed by a governmental rule or policy, a court must carefully balance that harm against the precise harm to the state interest if a religious exemption is extended. The balance will not always tip the same way.

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[32] See generally United States v. Lee, 455 U.S. 252, 261 (1982); Gillette v. United States, 401 U.S. 437, 451-453 (1971).

Thus, in Wisconsin v. Yoder, the Court emphasized that its decision was based on a "convincing showing" made by the Amish, "one that probably few other religious groups or sects could make." 406 U.S. at 235-236. This included evidence demonstrating that the state's interest would not be seriously impaired were an exemption granted whereas compulsory education "would gravely endanger if not destroy the free exercise of [the Amish] religious beliefs." *Id.* at 218-219.[33]

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[33] Several courts, citing the unique situation of the Amish, have refused to extend a similar exemption to other

A total prohibition on peyote use would "gravely endanger if not destroy" the Native American Church.[34] Peyote is more than a sacrament of the Church; it is the basis of the religion itself. If peyote use is banned, the religion dies.

To other religions, the drug in question may not even be a "formal requisite" of the religion, but rather may be "considered by some" as an "aid to attain consciousness expansion." See, e.g., Leary v. United States, 383 F.2d 851, 860-861 (5th Cir. 1967), rev'd on other grounds, 395 U.S. 6 (1969).

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churches. See Fellowship Baptist Church v. Benton, 815 F.2d 485, 496-498 (8th Cir. 1987); Johnson v. Charles City Community School Board, 368 N.W.2d 74, 84 (Iowa), cert. denied, 106 S.Ct. 594 (1985).

[34] See Woody, 394 P.2d at 818; Whittingham; 504 P.2d at 952; Affidavits of Stanley Smart; Dr. Robert Bergman; and Reverend Emmerson Jackson, Exh. 7 to Smith transcript.

Because of this, the courts have easily distinguished the exemption granted to Native American Church members.[35]

Although the damage to the Native American religion if peyote use is prohibited is irreparable, the State's interests would not be seriously impaired were an exemption extended. The Native American Church carefully controls the use of peyote by its members; use outside of religious ceremonies is considered sacrilegious. Woody, 294 P.2d at 817.[36] The potential for abuse is therefore very limited. The use of other drugs by other religions is often less strictly regulated and more obviously harmful, thus making the need for an absolute prohibition more compelling.[37]

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[35] See, e.g., all involving marijuana, United States v. Rush, 738 F.2d 497 (1st Cir. 1984), cert. denied, 470 U.S. 1004 (1985); Vermont v. Rocheleau, 142 Vt. 61, 451 A.2d 1144 (1982); Hawaii v. Blake, 695 P.2d 336 (Haw. App. 1985); State v. Brashear, 92 N. Mex. 622, 593 P.2d 63 (1979); People v. Torres, 133 Cal. App. 3d 265, 184 Cal. Rptr. 39 (1982). Significantly, Rush, Brashear and Torres involved jurisdictions with a peyote exemption.

[36] See also Slotkin, The Peyote Way at 104, reprinted in Teaching From the American Faith - Indian Religion and Philosophy (Tedlock Ed. 1975) ("peyote is

Finally, peyote is unpleasant tasting:

> The eating of peyote usually is a difficult ordeal in that nausea and other unpleasant manifestations occur regularly.... The curious user

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"sacrament" to church, which "refuses to permit the presence of curiousity seekers at its rites, and vigorously opposes the sale or use of Peyote for non-sacramental purposes").

[37] See, e.g., Vermont v. Rocheleau, 142 Vt. 61, 451 A.2d 1144 (1982) (Tantric Buddhist arrested for marijuana use in nightclub restroom); Olsen v. State of Iowa, 808 F.2d 652 (8th Cir. 1986) (contrasting controlled, isolated peyote use by Native American Church with Coptic Church's "continuous and public use of marijuana"); People v. Torres, 133 Cal. App. 3d 265, 184 Cal. Rptr. 39 (1982) (marijuana used in "open and indiscriminate matter" without "prescribed safeguards"); Town v. Florida, 377 So.2d 648 (Fla. 1979) (continuous use of marijuana by members and nonmembers of church, including young children).

> frequently comments that it was an "interesting experience but not worth going through again."[38]

It is unlikely many people would fake religious belief in order to take advantage of a peyote use exemption.

On the other hand, a state may well be able to show that enforcement of its drug laws is impracticable if not impossible if religious exemptions are routinely granted to those professing a religious need to use a highly popular drug, such as marijuana.[39]

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[38] Anderson, Peyote: The Divine Cactus at 161 (Univ. of Ariz. Press 1980). See also Slotkin, The Peyote Way at 98 ("many find it bitter, inducing indigestion or nauseau. A common complaint is "It's hard to take Peyote").

[39] The 1985 National Household Survey on Drug Abuse conducted by the National Institute on Drug Abuse reports that 62 million Americans have tried marijuana at least once, and currently, among young people, 15 million use marijuana monthly, 9 million use it weekly, and 6 million, daily. In contrast, only 13 million Americans have ever tried any hallucinogen, which includes LSD, PCP, mescaline and peyote, and there are only 960,000 current users of all hallucinogens in all age groups.

As Congress has recognized, peyote use by the Native American Church is "sui generis" (see p. 44 supra). The State's prophecy of a drug enforcement system crippled by innumerable religious exemptions, were that use protected, is rank speculation unsupported by any evidence in this record or by the experience of other jurisdictions.[40]

Often lines must be drawn between religious practices that can be accommodated and those that cannot without unduly interfering with a compelling governmental interest. The State has not shown that peyote use by Native American Church members crosses this line.

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[40] See Sherbert, 374 U.S. at 407 (assertion that fraudulent claims would dilute unemployent compensation fund rejected as speculative on the record before the Court).

POINT IV

THE WRIT OF CERTIORARI WAS IMPROVIDENTLY GRANTED

Whether Native American Church members have a free exercise right to engage in the ritualistic use of peyote, is a "most delicate" question,[41] that should not be decided based on abstract principles alone. These cases, however, present a particularly poor vehicle for deciding this question.

Although the State of Oregon bears the heavy burden of showing that it is unable to exempt religious peyote use by Native American Church members without substantially impairing its more general interest in the welfare of its citizens, this issue was not litigated at the administrative level or in the state appellate courts. In the proceedings below, virtually no evidence was introduced about what peyote is, about its importance to the Native American Church, or about the frequency or manner of its use at religious ceremonies. The record is barren on the question of its physiological effects in general or when used only for religious purposes. No evidence was introduced about the drug's prevalence in Oregon, or about whether Oregon's alleged criminal sanctions against religious peyote users have been enforced in recent years. Nor was there any evidence about the problems or lack of problems controlling the drug's use in jurisdictions with experience in granting a religious exemption.

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[41] Wisconsin v. Yoder, 406 U.S. at 215.

In other jurisdictions where this difficult constitutional question was decided, the courts had the advantage of a fully developed factual record. See, e.g., State v. Whittingham, 19 Ariz. App.

27, 504 P.2d 950, 952 (1973) ("at trial both sides made a complete record concerning the effects of peyote"). This enabled the courts to carefully engage in the balancing process--to accurately gauge the importance of the state interest and the harm purportedly caused to the interest by a narrow religious exemption.

For this Court to decide an issue that will so powerfully impact on the central practice of a religious minority on a record as insubstantial as this one could work a grave injustice. As Justice Stevens has written:

> A decision on the merits does, of course, have serious consequences, particularly when a constitutional issue is raised, and most especially when the constitutional issue presents questions of first impression. The decision to decide a constitutional question may be the most momentous decision that can be made in a case. Fundamental principles of constitutional adjudication counsel against premature

> consideration of constitutional questions and demand that such questions be presented in a context conducive to the most searching analysis possible.

New York v. Uplinger, 467 U.S. 246, 251 (1984) (Stevens, J., concurring).

Since the "far reaching and important questions" raised in this case are not "presented by the record with sufficient clarity to require or justify their decision," the writ of certiorari should be dismissed as improvidently granted. Mishkin v. New York, 383 U.S. 502, 512-514 (1966).[42]

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[42] See also Minnick v. California Department of Corrections, 452 U.S. 105 (1981) (ambiguities in the record); Johnson v. Massachusetts, 390 U.S. 511 (1968) ("record insufficient to permit decision of constitutional claims); Commonwealth v. Painten, 389 U.S. 560 (1968) ("record not sufficiently clear and specific to permit decision of the important constitutional question involved"); Smith v. Mississippi, 373 U.S. 238 (1963) (same); Kimbrough v. United States, 364 U.S. 661 (1961) (same).

CONCLUSION

For the foregoing reasons, the judgment of the Oregon Supreme Court should be affirmed, or, in the alternative, the writs should be dismissed as improvidently granted.

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July, 1987

The research assistance of Judah Shechter, a second year student at Columbia Law School, and Judy Luwish, a senior at Beruria High School (Elizabeth, New Jersey), is gratefully acknowledged.